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**SPEECHES, ARGUMENTS,**  
**AND**  
**MISCELLANEOUS PAPERS**  
**OF**  
**DAVID DUDLEY FIELD.**  
"

**EDITED BY**  
**A. P. SPRAGUE.**

**VOLUME II.**



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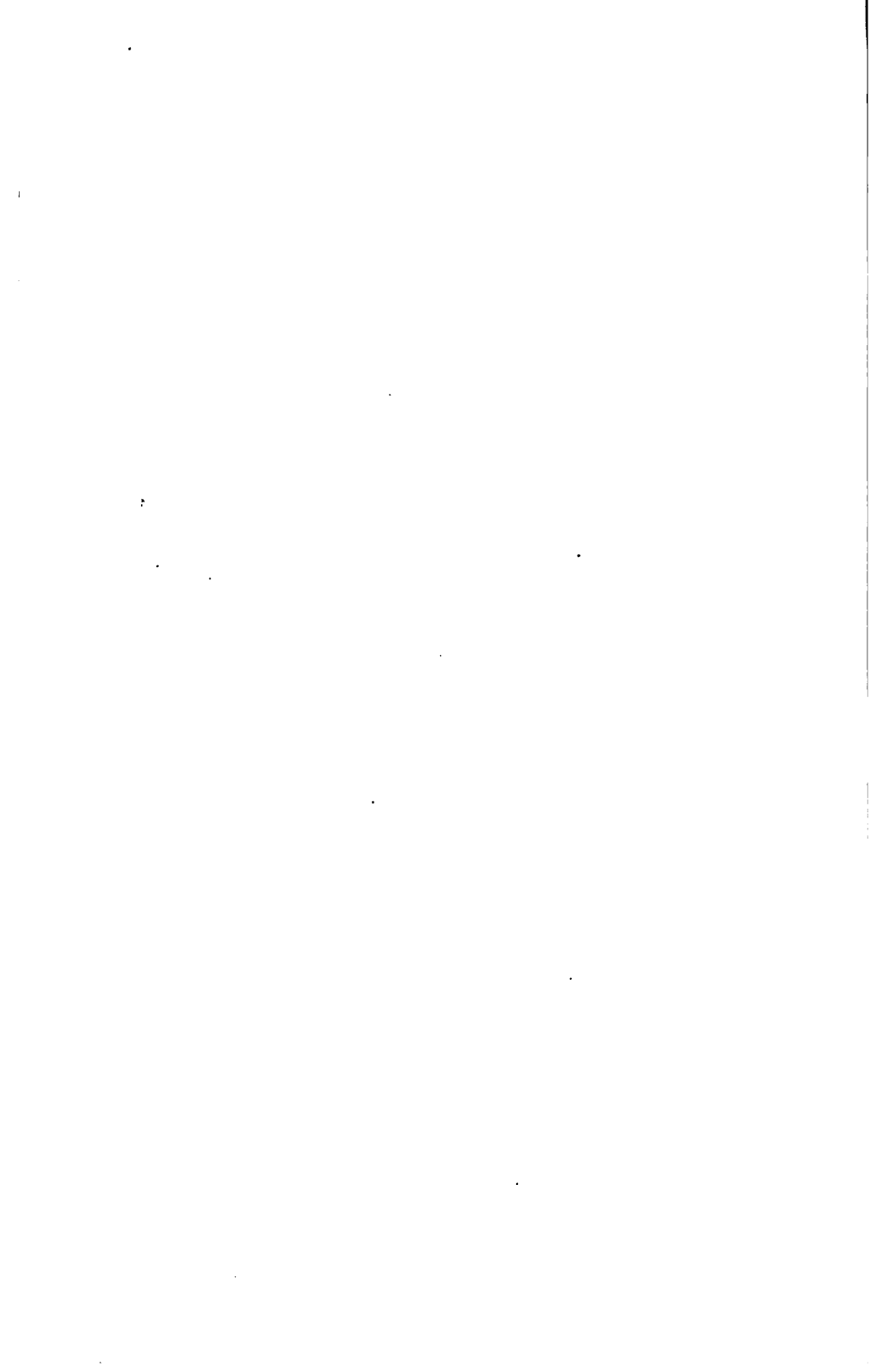
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## PART III.

*ADDRESSES AND PAPERS ON POLITICAL QUESTIONS.*

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# POLITICAL QUESTIONS.

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## THE OREGON QUESTION.

Article by Mr. Field, published in the "United States Magazine and Democratic Review," June, 1845.

THE Oregon is a tract of country on the western side of the New World, principally watered by the river Oregon, or Columbia, and its tributaries. It extends from  $42^{\circ}$  of north latitude to  $54^{\circ} 40'$ , and from the Pacific eastward, five or six hundred miles, to the ridges of the Rocky or Oregon Mountains. The name is taken from the river which, long before its actual discovery, had been supposed to exist beyond the mountains, and which was first called the Oregon by Jonathan Carver, of Connecticut, who traveled in the interior of the continent in 1766. How he got the name, or whether he invented it himself, it is impossible, at the present day, to determine. The stream was not actually seen till 1792, many persons until then believing it to be fabulous. The name, however, remained, and is now not only applied to the country from which its waters are gathered, but, as the name of the river itself, is

"Married to immortal verse,"

in

"... the continuous woods  
Where rolls the Oregon, and hears no sound,  
Save his own dashings."

This country is traversed by ridges of lofty mountains. The shores are bold and high, in many parts mountains rising immediately from the sea. Up to the forty-eighth parallel there

are few inlets or islands, but farther north there are thousands of islands and a network of bays and peninsulas. The valleys of the interior are generally narrow. The climate is drier and milder by many degrees than on the Atlantic side in the same latitudes. Of the soil, different accounts have been given, some representing it as fertile, and others as of little value. The most valuable portion of it undoubtedly lies south of the river, though by far the best part of the territory, for its harbors and maritime advantages, lies around the Strait of Fuca. To us, as a trading power on the Pacific, these are invaluable.

Until within a few years there have been but scanty settlements; a few trading-posts and missionary stations. But the tide of American emigration has lately set in that direction, and nothing but some fatal misstep on our part can prevent its habitable portions being occupied in a few years by our countrymen, and a vast trade thence carried on over all the Pacific.

This country is claimed by America \* as belonging exclusively to her, while England claims not an exclusive right in any part of it, but a right to occupy and settle on any portion with America and other nations.

The discussion between the two governments has grown to be an angry one; and, if we were to judge by the late declarations of the English ministry, there remains no arbitrament but the sword. It is difficult, however, to believe that the Government of Great Britain can seriously think of pushing its pretensions to the extent of a war, while we are confident that our Government, in maintaining the rights of America, will see the propriety of discussing them with moderation as well as firmness, doing no act to provoke, and sedulously abstaining from even the appearance of disregarding the obligation of treaties. But, while it does this, it has also a duty to perform to Americans. It is time that the arrogance of Englishmen, now become almost habitual, were rebuked. Let us indeed be just; let us appear just; and let England and consequences take care of themselves.

That we may present a concise as well as a just view of the

\* We use the words "America" and "American" in a national sense only, using another designation for the continent whenever we have occasion to mention it.

real merits of this question of the Oregon, we shall endeavor to condense into as small a space as possible the grounds, both of fact and of public law, on which our rights are founded. In doing this, we shall strive to omit nothing material to the inquiry.

What are the rules of public law by which the question of right, in this case, is to be judged? They are these:

1. That in respect to newly discovered countries, the first discoverer has the prior right to occupy, provided he does so within a reasonable time. What is a reasonable time depends upon the nature of the country, the uses to which it may be applied, and the wants of mankind in respect to it. If, for example, it were a rich West India island, the first discoverer could not rightfully prevent other nations from occupying and cultivating it, if he did not see fit soon to do so himself. If, on the other hand, it were a remote, barren island, there would be no necessity of immediate occupation.

2. That, if the first discoverer does not occupy within this reasonable time, he is deemed to have abandoned his right, and the next discoverer stands as if he had been the first, and so on through any number of discoverers.

3. That the discovery of a river is deemed the discovery of its course and branches, and of the country drained by it.

4. That all treaties and engagements between governments, of an executory nature, are annulled by a subsequent war.

With these rules before us, let us examine the questions of fact. The first settlements in the New World were all made on its eastern shores. The Pacific Ocean was discovered by Balboa at Panama in 1513. No person, however, ventured to the northwest coast as far as Oregon till 1543, when Ferrelo, a pilot in the service of Spain, penetrated to the latitude of forty-three. Thirty-six years afterward, Drake made his famous voyage round the world, and it is maintained by the English Government that he sailed as high on this coast as forty-eight; but, while one account of his voyage has it forty-eight, the other has it forty-three, and there is good reason to think that this last account is the true one. The discrepancy in the two accounts destroys their value as evidence, and no reasonable person would think of resting any title upon them. Drake

did not land on any part of this coast, and from that period for about two hundred years no Englishman visited it. The Spaniards, however, visited it several times, once more, at least, during the sixteenth century, twice in the seventeenth, and three times in the eighteenth, before the time of Cook's voyage. In 1778 that great navigator sailed along the coast, particularly examining the upper parts near the forty-seventh and forty-eighth parallels, and stopping at Nootka Sound. Afterward the coast was frequently visited by the vessels of the different maritime nations. The river remained undiscovered. Vancouver passed along the shore in 1792, examined it, and concluded that there was no river. Captain Gray, an American, in the American ship *Columbia*, however, discovered it on the 11th of May, 1792, and sailed into it a considerable distance. Its existence had been previously suspected, as we have already mentioned; and Heceta, a Spanish navigator, had, in 1775, run along the shore, and on the 15th of August, at six in the evening, arrived opposite a bay in the latitude of  $46^{\circ} 17'$ , "where the currents and eddies were so strong that, notwithstanding a press of sail, it was difficult to get clear out of the northern cape, toward which the current ran, though its direction was eastward in consequence of the tide being at flood." These eddies and currents caused him "to believe that the place is the mouth of some great river, or of some passage to another sea. . . . Notwithstanding the great difference between the position of this bay and that mentioned by De Fuca," he "had little difficulty in concluding they might be the same." He found it difficult on the following morning to enter, and continued his voyage toward the south. This does not appear to us to be a discovery of the river, or what was equivalent to it.

The other remarkable places on the coast are the Strait of Fuca and Nootka Sound. The former was discovered by De Fuca, a Greek pilot, in the service of Spain, in 1592; the latter by Perez, also in the Spanish service, in 1774.

The first visits to this country, overland, were made, one by McKenzie, in the English service, from Canada, crossing the Rocky Mountains to the north of the head-waters of the *Columbia*, in 1793, and passing to the sea in the parallel of fifty-two and a half; the other by Lewis and Clarke, in the American

service, who traversed the greater part of the Oregon region in 1805, and explored the river from its source to its mouth. So far, then, as the right of discovery is concerned, it should seem very clear that the Spanish Government had the title to the coasts and the country about Fuca's Straits, and that the American Government had the same title to the interior washed by the river Oregon and its tributaries.

As to occupancy. After the American war a considerable trade in fur sprang up on the northwest coast, vessels going there to take in cargoes for the China market. This trade provoked the jealousy of the Spanish Government, which all the while claimed the dominion of the coast, so that, in 1788, the Viceroy of Mexico sent two vessels, the *Princesa* and the *San Carlos*, to inquire particularly respecting the Russian establishment at Prince William's Sound, and then to explore the coasts southward to California, looking for places convenient for the reception of Spanish colonies. The commanders on their return reported that the Russians had eight settlements on the coast, containing altogether two hundred and fifty-two Russian subjects, all west of Prince William's Sound, and that they were informed that two vessels had been sent that summer from Kodiak to form an establishment at Nootka Sound. The Viceroy thereupon dispatched vessels early in 1789, with orders, in case any Russian or British vessel should appear at Nootka, to receive her civilly, but to declare the paramount rights of the crown of Spain. Up to this period, May, 1789, no settlement or establishment whatever had been attempted, for the alleged settlement of Meares at Nootka must be regarded as a mere pretense, and no civilized nation had exercised any jurisdiction in any part of the west coasts of the New World between San Francisco and Prince William's Sound.

Arriving at Nootka, the Spanish commanders landed materials and built a fort; and afterward seized two British vessels which were engaged in the trade of the coasts. For this proceeding the British Government demanded reparation; a warm dispute arose between the two governments, that had wellnigh ended in war; but, finally, under the mediation of France it was brought to a close, by a convention, commonly called the Nootka Treaty, or the Convention of the Escorial, which, as

it is important in this controversy, we shall give entire in the course of this article.

The Spaniards also formed another settlement on the south side of the Strait of Fuca; and they continued at Nootka, with some intermissions, until about 1795, when they left it, for no other reason, so far as is known, than that it was useless and expensive. Since then they have had no settlements north of San Francisco.

The first settlement of any kind made by British subjects west of the Rocky Mountains was in 1806, by Simon Fraser, who formed a trading establishment at a small lake, in the fifty-fourth parallel of latitude. Neither he nor any other British subject saw any of the waters of the Oregon until five years afterward, and after Astoria had been founded in the Oregon country itself by American citizens. Before 1810, Mr. Henry, an agent of the Missouri Fur Company, had established a trading-post on a branch of the Lewis River, one of the tributaries of the Oregon. The hostility of the Indians and the want of provisions led to its abandonment, however, in that year. In the same year, Captain Smith, of the ship *Albatross*, of Boston, attempted a settlement on the Oregon, about forty miles from its mouth. He built a house and planted a garden; but, the site not being good, he left it before the close of the year. Meantime Mr. Astor's expedition had been fitted out, and in March, 1811, Astoria was founded at the mouth of the Oregon. During the war it was captured by the British, but was restored in October, 1818, in pursuance of the stipulations of the treaty of peace.

From that time to the present, the two governments, with few intermissions, have been engaged in negotiations about the title to the country; and it was agreed between them, first in 1818 and afterward in 1827, that it might be temporarily occupied by the people of both nations, without, however, impairing in any way the title of either; \* so that none of the discoveries

\* The conventions between the two countries are as follows:

CONVENTION OF OCTOBER 20, 1818.

"ARTICLE III. It is agreed that any country that may be claimed by either party on the northwest coast of America, westward of the Stony Mountains, shall, together with its harbors, bays, and creeks, and the navigation of all rivers within

or settlements of either America or England since that time can in any manner affect the title.

So far, then, as occupancy is concerned, it appears scarcely disputable that the first settlements were by Spain, the second by America, and the last by England, and that the rights derived from occupancy are held in the same order.

The rights we have been hitherto considering are those which are derived from discoveries and settlements, on the Pacific coasts or overland, from the eastern side of the mountains. But there are certain other rights which must not be overlooked—the rights derived from discoveries and settlements on the Atlantic coasts.

On the first colonization of the New World, the discovery and settlement of the Atlantic border were claimed to give a title across the continent. The enlarged charter to the first colony of Virginia, for example, granted the country extending along the seacoast four hundred miles, and into the land throughout from sea to sea.

the same, be free and open, for the term of ten years from the date of the signature of the present Convention, to the vessels, citizens, and subjects of the two powers; it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the claims of any other power or state to any part of the said country; the only object of the high contracting parties, in that respect, being to prevent disputes and differences among themselves."

CONVENTION OF AUGUST 6, 1827.

"ARTICLE I. All the provisions of the third article of the Convention concluded between the United States of America and his Majesty the King of the United Kingdom of Great Britain and Ireland, on the 20th of October, 1818, shall be, and they are hereby, further indefinitely extended and continued in force, in the same manner as if all the provisions of the said article were herein specifically recited.

"ART. II. It shall be competent, however, to either of the contracting parties, in case either should think fit, at any time after the 20th of October, 1828, on giving due notice of twelve months to the other contracting party, to annul and abrogate this Convention; and it shall, in such case, be accordingly entirely annulled and abrogated, after the expiration of the said term of notice.

"ART. III. Nothing contained in this Convention or in the third article of the Convention of the 20th of October, 1818, hereby continued in force, shall be construed to impair, or in any manner affect, the claims which either of the contracting parties may have to any part of the country westward of the Stony or Rocky Mountains."



De Soto, a Spaniard, was the discoverer of the Mississippi; but the French from Canada first explored its northern branches, established posts and colonies on their banks, and, advancing down the river, finally got possession of the whole valley. Up to the Peace of 1763, France claimed and possessed the countries watered by the St. Lawrence and the Mississippi, and their dependencies, under the names of New France and Louisiana; and, by the treaty then made, Canada was ceded to Great Britain, and the Mississippi adopted as the boundary of their respective territories on the south.

By the Treaty of Utrecht (A. D. 1713), all the Spanish titles to territory in the New World, as they stood in the time of Charles II of Spain, who died in 1700, had been confirmed and guaranteed by Great Britain. By the Treaty of 1763, the Treaty of Utrecht was confirmed, and the river Mississippi was irrevocably fixed as the boundary between the English and French possessions. In terms it declares: "In order to reëstablish peace on solid and durable foundations, and to remove for ever all subjects of dispute with regard to the limits of the British and French territories on the Continent of America, that for the future the confines between the dominions of his Britannic Majesty in that part of the world shall be fixed irrevocably by a line drawn along the middle of the river Mississippi, from its source to the river Iberville, and from thence by a line drawn along the middle of this river, and the Lakes Maurepas and Pontchartrain, to the sea." Nothing is said of the western limits of the French possessions, or of any claims of the English in that quarter. Now, if England had then any title to the northwest coast, another boundary should have been settled between her and France on that side. The omission to do so implies that she had no title, or, if she had, that she then renounced it for ever to all territory west of the Mississippi and south of its source, or of the forty-ninth parallel.

We have thus explained all the original titles to the country. It remains to trace them to the present claimants, Great Britain and America. Great Britain has no title by cession, except what she may have obtained by the Nootka Treaty; America has received by formal cession, from both France and

Spain, all their rights; the first by the Louisiana Treaty in 1803, the other by the Florida Treaty in 1819.

At the Peace of 1763, France ceded to Spain "all the country known under the name of Louisiana." In 1800, by a treaty between the Republic of France and the King of Spain, in consideration of the republic enlarging the territories of the Duke of Parma, Spain ceded to the French Republic "the colony or province of Louisiana, with the same extent which it now has in the hands of Spain, and which it had when France possessed it, and such as it should be, according to the treaties subsequently made between Spain and other states." And in 1803 the same territory was "ceded to the United States, in the name of the French Republic, for ever, and in full sovereignty, with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above-mentioned treaty with his Catholic Majesty."

Considerable discussion has been had respecting the proper western boundaries of Louisiana as thus ceded. We are inclined to the opinion that it reached to the South Sea. To us, however, the question appears to be of less importance in its relation to the present controversy, for the reason that it could only concern America and Spain, and that their differences respecting it were settled by a full cession to America by the Treaty of Florida. Louisiana might have been greater or less; it might have stopped at the mountains, or have gone to the Pacific; but England, in either case, had no rights there: she had parted with all she had, to either France or Spain, at the Peace of 1763.

The restitution of Astoria, after the war, is another important fact, by no means to be overlooked in this part of the argument. It will be recollected that the post was surrendered by Great Britain to the Government of this country, by a formal act, so late as 1818; and if, as is asserted, there was any reservation in respect to its bearing upon the question of right, there is no evidence that any such reservation accompanied the act of delivery, or was made known to our Government. One thing is quite clear, that if Astoria was upon British soil, it was unauthorized, and, having been taken in lawful war, this Govern-

ment had no claim whatever to its restitution. The act of restitution, therefore, admitted that America had rights in the territory, even so early as the breaking out of the war, and long before the cession by Spain of her rights by the Treaty of Florida.

Between Spain and America there arose a question, after the cession of 1803, respecting the proper limits of Louisiana, which was finally terminated in 1819 by the Florida Treaty, by which it was agreed that a line drawn along the forty-second parallel of latitude, from the meridian of the sources of the Arkansas westward to the Pacific, should form the northern boundary of the Spanish possessions, and the southern boundary of the American possessions, in that quarter: "His Catholic Majesty ceding to the United States all his rights, claims, and pretensions to any territories north of the said line"; the United States on their part ceding Texas to Spain.

Whatever title, therefore, either France or Spain ever had to the Oregon, except so far as the Nootka Treaty may have modified the rights of Spain, has been completely vested in this country; so that, with that exception, which we are about to consider, whether we regard the title acquired by the original discovery of the coast on the Pacific and the Straits of Fuca, or by the Spanish settlements on that strait or at Nootka Sound, or that derived from the discovery of the river Oregon, the overland exploration of its stream, and the settlements on its branches, or the title derived from the discoveries and settlements on the Atlantic coasts and on the rivers St. Lawrence and Mississippi, we see them all tend to one point, and united in this country, vesting in us a title, as we believe, not to be shaken.

These titles *all* cover the country as far north as the forty-ninth parallel, embracing the Strait of Fuca and the parts adjacent; while the title derived from Gray's discovery extends to the head-waters of the Columbia, a little above the parallel of fifty-two, and that derived from the Spanish cession of 1819 extends to the Russian possessions.

The most important grounds on which the British Government defend their pretensions are Drake's voyage and the Nootka Treaty. The evidence, as we have already said, of

Drake's visit above forty-three, is too slender for serious argument. Indeed, we may say that whatever appearance of right there may be in these pretensions rests altogether upon the Treaty of 1790; and such, we infer, is the view of the British Government itself; for there is no other reason for their confining their pretensions to joint occupation and settlement. If any other of their grounds were valid, their title would be exclusive.\*

The British Government maintain that by virtue of that treaty they acquired a perpetual right to all parts of the northwest coast, "for all purposes of commerce and settlement, the sovereignty remaining in abeyance." The Convention is in these words:

ARTICLE I. The buildings and tracts of land situated on the northwest coast of the Continent of North America, or on the islands adjacent to that continent, of which the subjects of his Britannic Majesty were dispossessed about the month of April, 1789, by a Spanish officer, shall be restored to the said British subjects.

ART. II. A just reparation shall be made, according to the nature of the case, for all acts of violence or hostility which may have been committed subsequent to the month of April, 1789, by the subjects of either of the contracting parties against the subjects of the other; and in case said respective subjects shall, since the same period, have been forcibly dispossessed of their lands, buildings, vessels, merchandise, and other property whatever, on the said continent, or on the seas and islands adjacent, they shall be reestablished in the possession thereof, or a just compensation shall be made to them for the losses which they have sustained.

ART. III. In order to strengthen the bonds of friendship, and to preserve in future a perfect harmony and good understanding between the two contracting parties, it is agreed that their respective subjects shall not be disturbed or molested,

\* "Great Britain claims no exclusive sovereignty over any portion of that territory. Her present claim, not in respect to any part, but to the whole, is limited to a right of joint occupancy in common with other states, leaving the right of exclusive dominion in abeyance."—(*British Statement made by Messrs. Huskisson and Addington in the negotiation of 1826-27.*)

either in navigating or carrying on their fisheries in the Pacific Ocean, or in the South Seas, or in landing on the coasts of those seas in places not already occupied, for the purpose of carrying on their commerce with the natives of the country, or of making settlements there; the whole subject, nevertheless, to the restrictions specified in the three following articles:

ART. IV. His Britannic Majesty engages to take the most effectual measures to prevent the navigation and the fishery of his subjects in the Pacific Ocean, or in the South Seas, from being made a pretext for illicit trade with the Spanish settlements; and, with this view, it is moreover expressly stipulated that British subjects shall not navigate or carry on their fishery in the said seas, within the space of ten sea leagues from any part of the coasts already occupied by Spain.

ART. V. As well in the places which are to be restored to the British subjects by virtue of the first article, as in all other parts of the northwestern coasts of North America, or of the islands adjacent situate to the north of the parts of the said coast already occupied by Spain, wherever the subjects of either of the two powers shall have made settlements since the month of April, 1789, or shall hereafter make any, the subjects of the other shall have free access, and shall carry on their trade without any disturbance or molestation.

ART. VI. With respect to the eastern and western coasts of South America, and to the islands adjacent, no settlement shall be formed hereafter by the respective subjects in such part of those coasts as are situated to the south of those parts of the same coasts and of the islands adjacent, which are already occupied by Spain: provided that the said respective subjects shall retain the liberty of landing on the coasts and islands so situated for the purpose of their fishery, and of erecting thereon huts and other temporary buildings, serving only for those purposes.

ART. VII. In all cases of complaint or infraction of the articles of the present Convention, the officers of either party, without permitting themselves previously to commit any violence or acts of force, shall be bound to make an exact report of the affair and of its circumstances to their respective courts, which will terminate such differences in an amicable manner.

With respect to this Convention, it is to be observed :

1. That it is an executory agreement, one of that class which is annulled by war ; and which lasted, therefore, only so long as peace was preserved between England and Spain, which was six years.

It is not an acknowledgment of an existing right, but an engagement between the parties that "their subjects should not be molested in landing on the coasts, not already occupied, for the purpose of carrying on commerce or making settlements"; an engagement of the same class with treaties for the regulation of navigation, tariffs, or fisheries.

In the analogous case of the Newfoundland fisheries, Great Britain herself insisted that the liberty given us to fish and land on the coasts of Newfoundland was annulled by the War of 1812, taking occasion at the same time to declare that she "knows of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties." \*

\* That our readers may be better able to compare the two conventions, we subjoin the third article of the definitive treaty of peace of 1788 :

"It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of any kind on the Grand Bank, and on all the other banks of Newfoundland ; also in the Gulf of St. Lawrence, and at all places in the sea where the inhabitants of both countries used at any time heretofore to fish ; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island), and also on the coasts, bays, and creeks of all other of his Britannic Majesty's dominions in America ; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled ; but, so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement with the inhabitants, proprietors, or possessors of the ground."

The American plenipotentiaries insisted that these provisions were of perpetual obligation, for the reason that they were the acknowledgment of a previous right, common to all the persons composing the British Empire before its dismemberment, and made part and parcel of their partition of territory and of common rights at the peace ; but the British plenipotentiaries, on the other hand, maintained that they were concessions depending for their continuance upon the continuance of the engagements between the two contracting parties, and revoked by that which revokes all contracts, a subsequent war ; so that, while the positions then taken by the American Government do not contradict those which they now take respecting

It has been said, indeed, on the part of the British Government that the engagements of this treaty, even if revoked by the war, were renewed by the following stipulation between Spain and England made in 1814, viz.: "It is agreed that, pending the negotiation of a new treaty of commerce, Great Britain shall be admitted to trade with Spain upon the same conditions as those which existed previously to 1796, all the treaties of commerce which at that period subsisted between the two nations being hereby ratified and confirmed." To this position there are two answers: first, that the liberty to settle on the northwest coasts was not part of a treaty of commerce; and, second, that the stipulation obviously related only to the European dominions of Spain.

2. If no war between Spain and Great Britain had intervened, still the engagements of the Nootka Treaty were in their nature temporary; intended to provide for a state of things where there were no permanent settlements, and quite unsuited to, indeed incompatible with, a real occupation of the country by permanent civilized communities with an established government and a system of laws to be administered. The things contemplated by the Convention were rather trading-posts and a commerce in furs than any such permanent occupancy as we have been mentioning.

To carry out and perpetuate the treaty, according to the British interpretation, would be to condemn the whole country to eternal waste, except for the purpose of hunting and trading with the natives, or to place there, side by side, American citizens and British subjects, to cultivate the earth, build towns, and carry on a traffic through the Pacific, each class governed by a different system of laws, different sets of magistrates, and

the Nootka Treaty, the British Government then maintained and adhered to a doctrine of public law wholly irreconcilable with their present pretensions.

The reader who is curious in such matters will find some observations respecting the kind of conventions which survive a war, in the cases of the *Society for the Propagation of the Gospel vs. the Town of New Haven*, in 8 Wheaton's Reports, 464, and *Sutton vs. Sutton*, 1 Russel and Mylne, 663.

The distinction between what is called by the publicists *transitory conventions* and other national compacts may be illustrated by the distinction somewhat analogous between a conveyance, by which a title is actually vested in a grantee, and a contract, which gives no title, but a claim on the contracting party.

owing allegiance to different governments. That surely is a state of things which we should be slow to admit was agreed upon, and slow to submit to.

There are some minor arguments brought forward by each party which we do not think it necessary here to mention. They do not change the aspect of the case as we have presented it. If the main arguments which we have examined do not decide it, the smaller ones will not.

The last propositions between the two parties for the settlement of the controversy were, on the American side, that the line of the forty-ninth parallel, the boundary on this side of the mountains, should be continued to the Pacific; and on the British side, that the line should be continued only to the headwaters of the river Oregon, and then down that river to the sea, the stream being the boundary, and to continue for ever common to the two nations. Whether in the late negotiations different terms have been proposed on either side, we are not informed.

Upon the whole matter, we have formed an opinion the most decided, that the American claim is founded in law and justice; and we think we do but declare the decision of the American people when we say that the forty-ninth parallel is a reasonable and proper compromise, and the southernmost limit which America ought to concede.

With respect to the mode of dealing with the British Government hereafter, we must say, in the first place, that we should be slow to submit to the arbitrament of a European sovereign. There are many reasons of a political nature why a claim of this country to territory should not be decided by any potentate. Our rights are now in our own keeping, and we prefer that they should remain so; but at the same time, notwithstanding this disinclination to the arbitrament of a foreign prince, we would take that much sooner than incur the chances and calamities of war. We would, moreover, on no compromise, recede from the line of the forty-ninth parallel. That divides the territory into two nearly equal parts: it carries our northern boundary in a straight line from the Lake of the Woods to the South Sea, and it secures to us what we most want, the noble harbors about the Strait of Fuca and the exclu-



sive control of the river Oregon in its whole course. But we would not close the door upon negotiation. We would endeavor to persuade Great Britain that our rights were perfect, and that we were unanimous in maintaining them. We would not be in haste to close the negotiation, satisfied that every day adds strength to our possession. We would afford protection to our countrymen who may go there to settle or to trade; and for that purpose a law ought immediately to be passed, extending the jurisdiction of our courts over American citizens in that country. So long as there was any hope of an amicable arrangement, we would not terminate the joint occupancy provided by the conventions of 1818 and 1827, believing that to do so would but irritate, and might break off negotiation. But, if negotiation does not promise favorable results, and as soon as a reasonable prospect of adjustment by that means was past, we would terminate the joint occupancy, in the mode provided by the conventions, and establish a territorial government. If, then, Great Britain chose to resist, we would meet force by force.

If that day should ever come (which may God avert!), the consequences of the struggle are beyond the reach of human eyes. Some of them, however, we may reasonably anticipate; and, in regard to all, our countrymen have no just cause for apprehension.

The final result of the warlike operations would probably be the extinction of British power on this continent. At first, no doubt, we should suffer immensely from want of adequate preparation to meet the vast disposable force under the control of Great Britain. It seems a weakness of republican government not to prepare itself for such emergencies. Jealousy of great establishments, especially those which are supported by the state, seems inseparable from popular institutions. Such, at least, has been our experience. Great Britain, on the other hand, is thoroughly prepared: with well-disciplined and numerous armies, with ships of war hovering on every sea, with warlike stores and munitions, collected without stint of expense or labor, for many years. She has naval stations on every coast, fortresses and troops wherever there are islands which she could seize—a belt of frowning fortresses all round the

globe. With these well-appointed means at hand, she would strike heavy blows in the first year of the war, inflicting upon us greater sacrifices, probably, than it would have cost us to keep adequately prepared for half a century.

But the vigor and elasticity of this people would bear them up against these assaults and losses; their resources, almost boundless, would be developed with greater rapidity than the calm times of peace could have produced; all kinds of manufactures possible to us would take root; and every means which this people could command would be brought out to serve the purpose of defense and annoyance. Every element of disaffection in the neighboring provinces would be nourished into rebellion. Republican armies would plant the standard of revolt in their soil. We should offer their inhabitants freedom from the galling colonial yoke, exemption from the swarms of foreign officers who infest their homes, self-government in its best and truest acceptation, and a union with our circle of free States. We should point out to them—if indeed it be not already impressed on their minds—the difference between the two systems, as they appear upon the opposite sides of the St. Lawrence and the lakes. If they did not profit by the lesson and the occasion, they would prove themselves of a different spirit from what we take them to be.

On our southern border, Mexico would probably be stimulated by the offers of England, added to the irritation which she now naturally feels, to join in the war; and the consequences of it would be that that country would be overrun by invaders from the South and Southwest. What means of defense she has on her open frontier, we do not see. A Western hunter will carry provisions enough on his back to subsist him ten days, and by that time he would place himself in the habitable and fruitful parts of Mexico. All the efforts of England, both at the South and the North, would be exhausted upon the seacoasts. She could make no impression on the interior; and from the interior would be organized forces which, aided by the disaffected population north of us, and the weakness of the races south, would carry American dominion from the ancient seat of the Aztecs to the Arctic Sea.

Upon the ocean itself, the contest would be long and bloody ;

but it is our conviction that it would end in breaking down the maritime superiority of England. We would not underrate English power on the sea. We know it well; but we do not fear it. We know that her mercantile marine is not a third greater than ours; and we believe that, in the long-run, in a war of many years, as this would be, the armed marine would become proportionate to the commercial. In that case, considering the greater number of possessions which England has to defend, and the larger number of ships to convoy, the two navies would come to something like an equality of disposable force. And, if that were to happen, who can doubt the result? We have now, it has been estimated, two hundred thousand men employed in navigation. If one half of them could be placed in armed vessels, they would constitute a greater force than England has ever had upon the sea.

There are other results of a war between this country and England, perhaps even more important than any operations of arms, which we will briefly glance at. One of them is the complete and final emancipation of the American mind from English influence. How great this influence even now is, we have too often occasion to observe and deplore.

There is among the people of this country an hereditary and undue respect for the name of England, an excessive admiration of her past history, and an exaggerated estimate of her present power. These are the remnants of colonial ideas, which half a century of independence and two bloody wars—one of them long and full of circumstances of exasperation—have not been sufficient to eradicate. The facts of our history have run far ahead of our opinions. With a government of our own choice, and laws of our own making, we receive from abroad the most effective of all laws—laws for the mind. If we do not act as we are commanded, we think much as we are commanded, from Europe. From this injurious and disgraceful thralldom we are gradually emancipating ourselves. A war would do it at once.

Another result would be the purification of our own political atmosphere. "The cankers of a calm world and a long peace" are no fiction. They are undeniable realities. Offices go to those who need, not to those who are needed. Politics

becomes a trade. Lesser qualities have as much appreciable value and are associated with fewer scruples than great ones. But, when the state is in danger, patriotism and ability take precedence of selfishness and mediocrity. The first effect of a collision would be to bring the ablest and best men uppermost.

Let us not be misunderstood. For none of these reasons do we desire a war. Far from it. We deprecate it. We would do everything that we could, consistently with our obligation and our future safety, to avoid it. But, if it come, we shall consider it not an unmixed evil.

If this article had not already been extended as far as is reasonable to ask the attention of the reader, we should have gone into some further topics connected with the relations between America and England. We may, perhaps, return to them hereafter. Suffice it at present to add that, in what we have said, we desired to keep in view the distinction between the mass of the English people and the Government of England. For the former, we have respect and sympathy. They are of our kindred and our flesh. But the latter is a selfish and insolent oligarchy. It strove to oppress us once, and is therefore our hater now. It is that we combat, and its spirit that we detest.

If ever the Government of that country becomes so popular as to admit into it the just authority and influence of the people (and there are indications that such a change is coming over the spirit of our fatherland), we may reasonably expect to see a corresponding change in our mutual relations. Then we may hope to see England sincerely our friend and fellow. Then, instead of hostile diplomacy and hostile forces, may we have between us only messengers of friendship and of good!

## THE BRITISH QUARTERLY REVIEWS ON THE OREGON.

Article by Mr. Field, published in "The United States Magazine and Democratic Review," November, 1845.

SINCE the article in our June number on the Oregon question, two of the British Quarterly Reviews have contained articles on the same subject, which may be regarded as expressions of the views of the two parties into which the people of Great Britain are divided. The "Edinburgh" reasons in a liberal spirit; and, though it leans to the British side, thinks, nevertheless, that there may be some justice on ours, and counsels moderation. The "Foreign Quarterly" is insane in its hatred of America and everything American, sees nothing in our claims but unfounded pretensions, and appears to think that nothing more is needed than British threats to frighten us into an abandonment of them.

Neither of these articles in itself would be entitled to much consideration; but they are to be treated differently. The "Edinburgh" is moderate, and should be answered with reasons; the "Foreign Quarterly" is too furious to be reasoned with, if its braggart tone did not place it beyond the pale of argument.

Perhaps our readers would like to see the latest arguments of the English in a condensed form. We will give them, therefore, a summary of the argument of the "Edinburgh," passing over all that part of the article which does not relate strictly to the disputed question.

It begins with assuming that sovereignty over an unoccupied country may be acquired by five different means: discovery, settlement, contiguity, treaty, and prescription; and it lays down the preliminary proposition that the acts by which the sovereignty is acquired must be the acts of a government, not of unauthorized individuals.

As to *discovery*: it admits that the title of Spain, so far as that could give it, was complete, and it rejects the claims arising from discovery of both the English and Americans. As to our claim to the country of the Columbia, founded upon the discovery of the river, it gives three reasons for rejecting it: first, that Gray was not actually the first discoverer; second, that, if he were, he was but a private individual; and, third, that the discovery of a river gives no title to the country drained by it—three reasons any one of which would be sufficient, if it were well founded.

As to *settlement*: it rejects equally the claims of America, of England, and of Spain, on the ground that all the settlements, small and partial at best, were the unauthorized acts of private individuals, up to the time of the Convention of 1818, since which no act of either America or England can have affected the title.

As to *treaty*: it admits that the Convention of the Escorial ought to be deemed a temporary arrangement, and that either nation has the right to terminate it, as it has the right to terminate the Convention of 1818. Then it insists that our claim, founded on purchase from Spain, is sophistical, for the reason, as we understand it, that we ceded to Spain the territory below forty-two, to which we had no title, and therefore could, under the same treaty, take no title from Spain to the territory north of that parallel—a reason the force of which we acknowledge ourselves unable to perceive.

*Prescription* it considers inapplicable to a case so recent; and as to *contiguity*, while it insists that neither America nor England can claim a perfect title by contiguity, it nevertheless admits that each has an imperfect title from that source to the portion of Oregon which adjoins its own frontier; America to that south of the forty-ninth parallel, and England to the rest.

Upon the whole, it maintains that the dispute is one eminently proper to be adjusted by arbitration, and thinks that an honest arbitrator would divide the territory by the forty-ninth parallel, giving, however, the whole of Vancouver's Island to England.

Such is a very brief summary of the argument of the "Ed-

inburgh." Our readers will perceive that it makes no claim upon the pretended discoveries of Drake, and that it abandons what we considered the strongest ground of the English claim, the Convention of the Escorial. Its other positions—viz., the denial of the priority of Gray's discovery, the denial of right acquired from discovery or settlement by private persons, and the denial that the discovery of a river gives a claim to the territory which it waters—demand some notice from us.

First, as to the priority of Gray's discovery. His only competitor is Heceta. The existence of the great river of the West was matter of tradition and of general belief long before his time. Who first actually discovered it? is the question. To have seen the coast where the river empties itself was not enough; that must have been done by all who coasted along the shore. To constitute a discovery of the river, it was necessary either to enter it or to see it, knowing it to be a river. Heceta's account of what he saw is as follows:

"In the evening of this day, I discovered a large bay, to which I gave the name of Assumption Bay, and of which a plan will be found in this journal. Its latitude and longitude are determined according to the most exact means afforded by theory and practice.

"The latitudes of the two most prominent capes of this bay, especially of the northern one, are calculated from the observations of this day.

"Having arrived opposite this bay at six in the evening, and placed the ship nearly midway between the two capes, I sounded, and found bottom in twenty-four *brasas*; the currents and eddies were so strong that, notwithstanding a press of sail, it was difficult to get out clear of the northern cape, toward which the current ran, though its direction was eastward, in consequence of the tide being at flood.

"These currents and eddies of the water caused me to believe that the place is the mouth of some great river, or of some passage to another sea.

"Had I been certain of the latitude of this bay, from my observations of the same day, I might easily have believed it to be the passage discovered by Juan de Fuca, in 1592, which is placed on the charts between the forty-seventh and the forty-eighth degrees, where I am certain that no such strait exists; because I anchored on the 14th of July, midway between these two latitudes, and carefully examined everything around.

"Notwithstanding the great difference between the position of this bay and the passage mentioned by De Fuca, I have little difficulty in conceiv-

ing that they may be the same, having observed equal or greater differences in the latitudes of other capes and ports on this coast, as I shall show at its proper time; and in all cases the latitudes thus assigned are higher than the real ones.

"I did not enter and anchor in this port, which in my plan I suppose to be formed by an island, notwithstanding my strong desire to do so; because, having consulted the second captain, Don Juan Perez, and the pilot, Don Christoval Revilla, they insisted that I ought not to attempt it, as, if we let go the anchor, we should not have men enough to get it up, and to attend to the other operations which would be thereby rendered necessary. Considering this, and also that, in order to reach the anchorage, I should be obliged to lower my long boat (the only boat I had), and to man it with at least fourteen of the crew, as I could not manage with fewer, and also that it was then late in the day, I resolved to put out; and at the distance of three or four leagues I lay to. In the course of that night I experienced heavy currents to the southeast, which made it impossible for me to enter the bay on the following morning, as I was far to leeward.

"These currents, however, convinced me that a great quantity of water rushed from this bay on the ebb of the tide.

"The two capes, which I name in my plan Cape San Roque and Cape Frondosa, lie in the angle of ten degrees of the third quadrant. They are both faced with red earth, and are of little elevation."

It will be seen from this account that Heceta did not enter the river; that his actual position was far outside the bar, in twenty-four fathoms of water; and there is no evidence that he even saw the opening of the land through which the river issues. All that he himself says is, that the currents and eddies led him to *believe* that the place was "the mouth of some great river or of some passage to another sea." This was not seeing the river, or entering it. It was a belief in its existence produced by the phenomena which he observed.

The two next are questions of international law. According to that law, does a discovery or settlement of an unoccupied territory by private individuals give any right whatever to the government or nation to which the individuals owe allegiance? We maintain that it does, and that this necessarily follows from the doctrine of allegiance and protection. Every citizen of this country who goes abroad on any lawful undertaking, goes as an American citizen, and is entitled to the protection of his government. If he enters the jurisdiction of another government, he submits himself to that for the time being; but, so long as he remains out of another jurisdiction,



this government should not permit another to touch him. What follows? That American citizens settling in any unoccupied country, not under another jurisdiction, are as much subject to the jurisdiction and government of their own country as if they were at home, and are equally entitled to its protection. Rights and duties are correlative. The new country having to be defended by the original government of its settlers, may be governed by it also. And the rule that obtains in respect to settlements by American citizens must obtain also in respect to discovery, which is but preparatory to settlement.

The doctrine of the English leads to this, that a nation can not communicate its authority, except in particular cases. Now, it must be admitted that any nation may give its sanction in what manner and to whom it pleases. It may commission a few officers to make discoveries and settlements in its name, and by its authority; or it may authorize all its citizens to discover and settle new countries; or it may declare that it adopts any discovery and settlement made by any of its citizens. If the sanction of the government is all that is wanted, we do not see why it may not be given afterward as well as beforehand.

The remaining point is the extent of claim accruing from the discovery of the mouth of a river. It is to be observed at the outset that the article in the "Edinburgh" does not state the claim itself with exactness. The ground taken by us is, that the *discovery* of a river is deemed a discovery of its course and branches, and of the country drained by it. Then we contend that from discovery flows the right of occupancy within a reasonable time.

What is discovery? Is it the actual sight of all the land or water within the limit? If it were so, the view of one side of a mountain would not be a discovery of the other, or one side of a bay the discovery of the opposite side. According to this, a discoverer might have sailed hundreds of miles along the northern shores of the Amazon without acquiring the rights of a discoverer in its southern shores, or any greater portion of the river than he actually saw. Now, so far from this being the received doctrine, it was pushed rather to the opposite extreme,

and, on one occasion, so far that the Spaniards laid claim to the Pacific, from the discovery by Balboa at Panama.

In reason as well as in fact, the discovery of one part of a river must be deemed a discovery of the rest ; for it gives a clew to the rest, and it is impossible to apportion it without leading to the most whimsical confusion.

This is as far as we need to go. If we had any title to the country of the Columbia by discovery, it has not been lost through the settlements of other nations ; for, in point of fact, there have been no such settlements on any of the waters of that river prior to ours.

But we could go further, and extend the same principle to actual settlement. The settlement is subsequent and auxiliary to the discovery ; it perfects the title, otherwise imperfect. A settlement at the mouth of a river extends its jurisdiction over the upper country, unless some part of that country has been already settled or discovered by another.

How is this doctrine of public law to be established ? By the practice of the nations concerned in the discovery and settlement of the New World. Before the opening of the great Columbian Continent to the eyes of Europe, there was no occasion for the establishment of any rule on the subject ; but, when the ambition and cupidity of the maritime nations of Europe strove to obtain as much as possible of the new-found hemisphere, some rules of partition, some foundation for their relative rights, became indispensable. The western shore of the Atlantic was the scene of their enterprises. How broad lay the continent before them they little knew. When they landed on the coasts, they took possession, as of the country to its westernmost limits. The first who reached the mouth of a river had found an opening into the land. The rivers were the gates of the interior ; they who possessed themselves of these gates conceived that they held good against all comers whatever lay within. And thus it happened that, without exception, so far as is now known, the possession of the mouth of a river was considered a title as against other European nations to all the country which lay above it, and was approachable through it ; in other words, to all the country which its waters washed in their whole course.

Thus the French, taking possession of the mouth of the St. Lawrence, claimed the country to the north and west; and, although the Spaniards actually first discovered the mouth of the Mississippi, yet they were met in their ascent by the French, descending from the Ohio and the upper Mississippi, whither they had crossed from the head-waters of the St. Lawrence; and these titles of the French and Spaniards had the effect to contract the titles of the English colonies, which before had claimed to the South Sea.

It was said by the British negotiators in 1818, and has been repeated by their journalists since, that our different titles are inconsistent with each other. What if they are inconsistent? Does that weaken our claim, or make the British a better one? There may be different claims to the same territory, of more or less strength—none of them perfect. Take, for example, the case of the claim by discovery, the claim by occupancy, and the claim by contiguity, held by different governments. If any one of these governments can by treaty unite them all in itself, it strengthens its title, and it does so because it thus furnishes an answer to its adversaries. One may prefer the first title, another may maintain that the second is the best. Neither of them can be demonstrated to be perfect; but the purchase of all the titles silences all the objectors. It is so in private affairs. A land-owner purchases an outstanding claim against his estate, to quiet his title. He does not thereby admit the title purchased to be good, or his own previous one to be bad. You can not destroy both his titles by asserting that the two are inconsistent with each other. His answer will be, "Tell me which title you consider good, and I will show you that I have it." It is puerile, then, for any Englishman, diplomatist or journalist, to disparage our titles as inconsistent with each other. They are a source of strength, not an evidence of weakness.

In regard to the line of partition which the "Edinburgh" recommends, we have not much to say. We have already expressed the opinion, in our former article, that the offer of the forty-ninth parallel, which our Government formerly made, was a reasonable and proper compromise, and the southernmost which we ought to concede. Our Government has twice offered

that line, and the English Government has as often rejected it. We would not repeat the offer, after two refusals. But at the same time we are free to say that, if England were to offer us that line without more delay, so as to put an end at once to the disquietude, which the very agitation of the matter occasions, we would accept it. We are not insensible to the objections that have been made to such a compromise, and we know very well that the state of irritation toward England which prevails among us, particularly at the West, disinclines a great body of our countrymen to make any terms with her. But, strong as are these objections and this feeling, we think they are outweighed by the considerations which favor an immediate settlement of the question, on the basis of some compromise. It is not the case of a proprietor giving up territory which belongs to him by an undisputed and indisputable title. We believe our title to the whole to be good—that to the part south of 49° to be the best—but we can not reasonably assume that Great Britain is not sincere in her claim also. We think it unfounded, but it is not indisputably so. How are these claims of two great nations to the same territory, each being sincere in its claim, to be adjusted? By compromise, by arbitrament, or by war. We are less disposed to arbitrament than to compromise, for the reasons given in the former number. War is the last resort when all others fail. We would compromise sooner than go to war; though we would go to war sooner than submit to a dishonorable compromise. As to Vancouver's Island, it should belong wholly to America. England has now almost a monopoly of islands. The rest of Oregon is not important to us. With Vancouver's Island, and the country south of the forty-ninth parallel, we hold the keys of the Pacific.

Thus we believe we have answered all the arguments of the "Edinburgh" which make against the positions that we have heretofore maintained in this "Review." One other observation of the reviewer must not escape us; that in which he sneers at the "ignorance of international law, which is the glaring defect of American statesmen." This is rather a remarkable observation for a Scotchman to make, seeing that neither Scotland nor England has yet produced any work of authority on international law, nor shown any particular apti-

tude for such studies, whether among its statesmen or lawyers, and that the observation is made of a country which has numbered Franklin, Adams, Jefferson, Jay, Gallatin, and Webster among its statesmen and diplomatists, and now boasts of the best living writer on international law. It should seem to be impossible for Englishmen or Scotchmen, however fair in general, to finish any discussion concerning America without a sneer at her. We do not care to retaliate on the "Edinburgh." If we did, we should ask it to point to any English statesman eminently instructed in the law of nations; and, if it could point to one, we should then refer to the history of English diplomacy and war, as to a history of infractions of that code.

The "Foreign Quarterly," as we have already observed, puts itself, by its insane scurrility, out of the pale of argument. It gives us slanders for reasons. To pronounce its article more furious and abusive than those which have preceded it, in the same journal, on American affairs, would be to make a distinction where all are eminent in wickedness. One might suppose that all the spleen of the disappointed throughout England, all the falsehood of all the false, were engaged in the service of that single journal.

The journal, however, is nothing. Who the reviewer may be, we know not. He may be a person whose opinions would not be thought to deserve a moment's notice in any private circle. But we fear that the utterance of such sentiments is grateful to the popular feeling in that country. We fear that they are the sentiments of a large class of its inhabitants. It is as the representative of a party that the journal can alone claim attention. Otherwise it has no significance.

As such a representative we regard it; and we ask whither this thing is tending. Is it the settled purpose of any considerable number of persons in that country to disparage this? Is it their aim to stir up ill blood between us? If such be the case, we are sorry for it. There are too many inflammable elements in each country to make it safe.

Perhaps we exaggerate the importance of these systematic attacks of the British press. In themselves considered, we certainly do not think them of any consequence; it is only as an

index of the direction in which the English mind is setting, that we consider them worthy of observation; and even then possibly we overrate the evil which they can do. But we can not help thinking that there is a world of danger in the course of our foreign relations at present, immeasurably increased by the tone of the English press; and on that account alone we make these observations respecting it.

Let us understand each other. The people of this country want nothing of the people or Government of England. We are willing to exchange with them the products of our soil and the work of our hands. We are glad to meet them in the offices of peace. Above all, we desire to participate in the advantages of every step in the arts, in science, in civilization throughout the world. But, in our intercourse with Great Britain, we give as much as we receive. Certainly, we are not sensible of any benefits received for which we should be grateful, and we feel no gratitude. If they like not our civil polity, we like theirs as little. If they are shocked at what they call the rudeness of our equality, we are not the less shocked at the servility, which we see in all their classes, from the cottagers to the nobles, each crouching to and fawning upon its superior.

It is not, therefore, to obtain advantages for ourselves, it is not from admiration or fear of England, nor from any other selfish or timid motive, that we refer to the spirit which appears now to prevail in that country toward us. But we take this occasion to make some observations respecting the attitude of the two countries toward each other.

That this attitude is at present unfriendly is too apparent. Perhaps at no period since the Revolution, with the single exception of the last war, and the occurrences immediately preceding, has it been more unfriendly than it is at this moment. Why is it so? It is not from any dislike entertained by Americans toward Englishmen. On the contrary, there are prejudices in their favor, associated with the name and history of their country, prepossessions traditional and hereditary, nurtured in childhood, promoted by the studies of youth, which the soberness and reason of maturer age can not wholly eradicate. Their sources are obvious, and their strength has proved

hitherto greater than revolution and war ; bands multifold, and stronger than iron, wound about the hearts of our people. Our education, even at this day, to our regret be it spoken, is substantially English. In this, the eighth generation from the settlement of Virginia and Massachusetts, we look to England as the great mother of our learning and our arts. From our youth upward, her books are in our hands and her songs on our lips.

Our people have always desired the sympathy of the English. As soon as the War of the Revolution was over, notwithstanding the circumstances of atrocity with which it was carried on, we were willing to lay them

“In the deep bosom of the ocean buried”—

to shake hands across the water, and make friends. The offer was repulsed, and from that day to this England has been neither a sincere friend nor a generous enemy.

What is the reason ? It is *her haughtiness and our rivalry*. She could not forget the mortification of her own defeats, and had not the magnanimity to forgive the success of her revolted colonies. Not that she had any cause for mortification or resentment. If she had been swayed by a catholic or philosophical spirit, she would have remembered that English power had been foiled in an attempt to put down English law, and that, just so much as law and freedom are better than power and oppression, she should have gloried in the triumph of the first over the last. If she had regarded less the disappointment of the moment than the permanent success of her best principles, and the spread of her laws and language, she would have rejoiced in the prodigious extension of all, by the dismemberment of the empire, and its partition into two great empires, one republican and the other monarchical.

If there were nothing then to justify this repulsive haughtiness to us, has there been anything since ? Beginning at the separation of the two countries, to which period their histories were the same, compare them from that point of divergence, to see which has done most for its own glory, and the advancement of the race. For half the period she has been waging a furious war, to prevent the spread of revolutionary doctrines in

Europe, and to maintain pretensions the most arrogant against the rights of neutral nations throughout the world. And in the intervals of European and American war, she has been warring in Asia, forcing her trade upon unwilling nations, despoiling people and princes, and interfering in the quarrels of the natives, to find pretexts for absorbing their possessions into her own dominions. In short, her foreign policy has been uniform—unceasing aggression upon the possessions and rights of nations. Look now at America. Hitherto she has sought only to possess her dominions and her rights in peace; has never engaged in war, but to defend them; has proclaimed the rights of men as the only foundation and source of power; offered an asylum to the poor and oppressed of all nations; subdued the wilderness, founded cities and States, and spread her commerce through both hemispheres by the arts of peace alone.

The English have won many victories by sea and land. They have trophies taken from many nations. But have they won victories from us? On the contrary, whenever we have met them on equal terms, has not their banner been brought to the deck or to the dust? It ill becomes them, we should think, to deport themselves haughtily toward us.

Then as to our rivalry, why should that make her an enemy? Can not rivals be friends? That is the political problem which she must solve. We find in it no cause for alienation. We think the world is large enough for us both. Her prosperity shall not mar ours. We will labor, and build, and traffic at our own free-will, and she shall do the same, without let or hindrance from us; and we can walk together over the earth, befriending and assisting each other none the less. If they find it otherwise, we regret it, but we can not help it.

We have relations with each other more and closer than any other two nations of the present or past: the same ancestry; the same language; the same laws; pursuits similar; habits of mind alike; energy and enterprise comparable only to each other's? No two nations have so many means of good within their reach.

We rival each other in commerce and the arts. We push our enterprises side by side into every branch of industry and



every corner of the earth. Wherever the American or the Englishman opens any new channel of trade, the other is sure to follow. In China and the remotest East, under the equator, and within the frozen zones, the stars of America and the cross of England float side by side. In all lands are to be found travelers and traders, of the same tongue and lineage, under the protection of different governments. This rivalry, more than all the mishaps of the past, explains the dislike of Englishmen to everything American. It solves more problems of state than diplomacy.

Pity that it should be so. With so many motives to bring them together, and so much good capable of accomplishment by their coöperation, we cannot sufficiently regret that they should have been so alienated. He would be the greatest of benefactors, not to these nations only, but to the whole human race, who should succeed in producing a cordial sympathy and coöperation between them. The blood of America is the blood of England, mingled with and enriched by the blood of other races; the spirit and enterprise of the Englishman being tempered by the perseverance of the Dutch, the thoughtfulness of the German, and the enthusiasm of the Huguenot. English blood thus runs in a quarter of the world. Englishmen and the descendants of Englishmen predominate in the New World, in Asia, and the southern islands. The English tongue is spoken in every zone and beneath every constellation of the sky.

But, with all these motives to a cordial understanding, it is, nevertheless, certain that the alienation of the two nations is becoming every day greater. What is common between them is put out of sight; sympathy is wellnigh extinguished; the waters of bitterness are swollen up and running over; they have maddened those who drink of them, till they seem ready to hunt each other up and down the world.

If our feeble voice could be heard by Englishmen, we would utter a word of warning before it is too late. We would beg them to remember that the fiercest wars which have ever desolated the earth have been set on fire by national resentments. We would say to them that, though we do not attach much importance to the attacks of individuals, whether writers or states-

men, yet we can not mistake the evidence which the number, frequency, and violence of these attacks give of the present disposition of great bodies of their countrymen. For three or four years the press has been profuse beyond example of every calumny, applied to Americans. And even while we write there has appeared a charge too gross we should have thought to be made or believed by men in their senses, that one of our national ships has been engaged in carrying slave-shackles, to be used in the slave-trade! If such things can be believed in England, or even spoken with the chance of being listened to, then are the people of that country ripe for a war with us, and on the verge of it.

It is at best a pitiable employment to stir up animosities, and especially between communities related to each other as theirs and ours. If by reason of conflicting interests or opposite maxims of policy, wars between us are inevitable, at least let us not add to the evils of ordinary warfare the tenfold bitterness of national revenge.

We should say to Englishmen: You are profoundly ignorant of America; you are blind to her history, her progress, her condition, and her destiny. You exaggerate your own importance, and you depreciate your adversaries—two errors, of which you will reap the fruits in your next wars. Your military resources alone would never have placed you in the front rank of nations. Your greatness was essentially and altogether maritime. Can any man tell how long even that can survive the changes that are now occurring in naval warfare?

You have indeed a noble country. God forbid that we should slander or debase it! It was the home of our ancestors, which makes it sacred. No man can look upon the unsurpassed richness of your island, its heavily-laden fields, its stately mansions, the vast commerce that fills its harbors, without doing homage to the industry that created such prodigies of wealth. But money alone is not always power. There may be a cancerous disease within, fastened upon the vitals of the state, and eating out its strength. You have in your own bosom weakness more than a counterpoise to all your power—discontented and indigent millions, whom a lost battle or a defi-

cient harvest may turn into rebels, clamorous for bread and for their rights as men, and pulling down in their fury the pillars of the state.

But where lie the foundations of our power? Deep in the hearts of the millions who themselves raised and now bear on their Atlantean shoulders the frame of our polity. With exhaustless territories of the most fertile soil, with energies untrammelled, free to seek their own good in their own way, competence within the reach of all, there is no task too great for our countrymen to accomplish, in a just cause and with united efforts. Unite them once in a war with your country, exasperate them by encroaching upon their rights, and by making them believe that they are the objects of your dislike, and you will have raised up against you an enemy more formidable than Holland under the Commonwealth or France under Napoleon.

Do not count upon dissensions among us. The genius of our institutions tolerates all sorts of opinions. There have been differences among us on almost all subjects, and they will doubtless continue. But the conduct of your countrymen does more than anything else to obliterate all differences of opinion respecting them. Notwithstanding the prejudices of an education favorable to you, and the innumerable ties which have hitherto drawn us toward each other, we fear that at this moment, if all America were polled, there would be a majority of voices for a war with you, and we are confident that all would desire your expulsion from the continent.

There is one subject above all others on which there can never be a difference of opinion among Americans; and that is, the introduction into the New World of the European system of intervention. The balance of power is an idea purely European. It has no place in the relations of other states. Its introduction here would at once draw us into the vortex of European politics, and would be resisted by all Americans as one man. We will meet the evil at the threshold. If force be necessary to prevent it, we will use force, and we will use it at the first moment of provocation. To hesitate would be to fall.

You may arrange your system in Europe as you choose, su-

pervise each other's governments, cut down a state, if it be too large, or partition it, if it harbor dangerous doctrines; but your scheme of policy shall not cross the Atlantic. We form no part of your system. We know little of your doctrines of legitimacy, and we care less. There is, in this respect, a gulf between the New World and the Old, which you shall not pass. If you have colonies in this hemisphere, govern them as you please; but that shall not introduce you as a party into our system of independent States. Our safety forbids it.

If we were to desire an occasion for war, we can imagine none so likely to unite all our people in its support, and to arm us with the sympathy of the wise and good throughout Christendom. The detestable system of intervention, more than anything else, has repressed the liberties of Europe, and kept back the improvement of the world. It is the mightiest engine of oppression that was ever devised. It has set its iron heel upon every foot of land from Cape St. Vincent to the White Sea. Its history is written in letters of blood. Spain—distracted and impoverished Spain—is a bleeding witness against it. Italy is another, watched by Austrian spies and garrisoned by Austrian troops. Germany is half stifled by it. It has crushed Poland to death. In a war between this system and the free system of the West, between the old spirit and the new, we should enlist on our side the hand of every free man, and the prayer of every true heart, throughout Europe itself.

We wish we could indulge the expectation that our difficulties about the Oregon would be settled by peaceful methods; but we fear it may be otherwise. Appearances are threatening. The demands of England are too great; her demeanor is too haughty; and our people are exasperated. Our Government can not yield more than it has done and preserve the confidence of the people. The question of peace or war, therefore, rests with England. Be it so. War is a great calamity; but it is not the greatest.

Far from us be the wish to accelerate that event. Rather, if it were in our power, would we chain the passions that are now howling to get loose, till the moderate and wise could reconcile these unhappy disputes. We show our desire for

peace by counseling compromise, notwithstanding the strenuous opposition it has received. But we fear it may be already too late. Our offers should have been accepted years ago. The dial can not move backward. England is arming. She is doing more: she is evoking as auxiliaries the terrible spirits of national jealousy and hatred.

If the territory in dispute were never so worthless, we could not allow ourselves to be pushed from it without ceremony. But it is not worthless. It commands the Pacific. The real subject of contention is the commerce of that sea. Its shores, so long occupied by semi-barbarous nations, are about to become the seats of civilization and power. The stake is a great one. A quarter of a century will find populous states along the margin of that sea. The imagination loses itself when it travels into the future, sees an active population, like that which occupies America, planted there, trading with the islands, with Australia, with China, India, and perhaps Japan (for that country can not long remain shut against strangers), and contemplates the probable consequences to the world. The increased intercourse with Eastern Asia may lead to a resurrection of the Asiatic mind. Certainly the power which shall then have been concentrated in the Pacific will make itself felt in all the concerns of men.

Let us assert our claims without needless offense. Let us show our consciousness of strength in our moderation. If we can have peace and our substantial rights, we will not take counsel of our resentments. And when war comes, if come it must, we will enter into it with the assurance that we have done everything reasonable to avert it; but with unshaken confidence that it will result in the maintenance of our rights and the discomfiture of their assailants.

## THE WASHINGTON PEACE CONFERENCE.

The Peace Conference consisted of commissioners from different States, assembled at Washington, in February, 1861, on the invitation of Virginia, with the view of adjusting, if possible, the controversy between the States respecting slavery. The commissioners from New York were David Dudley Field, William Curtis Noyes, John A. King, James T. Wadsworth, Amariah B. James, James C. Smith, Francis Granger, Erastus Corning, Greene C. Bronson, John E. Wool, and William E. Dodge. A committee of one from each State was appointed by the Conference, to which were referred the resolutions of the State of Virginia and the other States represented, and all propositions for the adjustment of the difficulties between States, with authority to report what might be necessary to restore harmony and preserve the Union. Mr. Field was placed upon the committee. On the 15th of February a majority of the committee reported several amendments to the Constitution of the United States, the general design of which was to fortify slavery. Mr. Field dissented, and on the 20th of February, 1861, spoke as follows:

THE questions now before the Conference I suppose arise upon the report presented by the majority of the committee, and upon the motion to substitute for that report the propositions of the minority of the same committee.

I propose to add to this report the three following propositions; and I will read them for the information of the Conference:

"I. Each State has the sole and exclusive right, according to its own judgment, to order and direct its domestic institutions, and to determine for itself what shall be the relation to each other of all persons residing or being within its limits.

"II. Congress shall provide by law for securing to the citizens of each State the privileges and immunities of citizens in the several States.

"III. The union of the States under the Constitution is indissoluble; and no State can secede from the Union, or nullify an act of Congress, or absolve its citizens from their paramount obligations of obedience to the Constitution and laws of the United States."

These additions would render the majority report much more acceptable to the Northern people than it is in its present shape, though even then, I am bound to declare, I could not support it. I prefer the substitute. In what I have now to say I shall not confine myself to a discussion of these propositions,

but, availing myself of the latitude of debate hitherto allowed to gentlemen who have addressed the Conference in favor of the report of the majority of the committee, I shall endeavor to bring to the notice of this body, more fully than I have yet done, my views upon the general question presented for our consideration.

For myself, I state at the outset that I am indisposed to the adoption, at the present time, of any amendment of the Constitution. To change the organic law of thirty millions of people is a measure of the greatest importance. Such a measure should never be undertaken in any case, or under any circumstances, without great deliberation and the highest moral certainty that the country will be benefited by the change. In this case, as yet, there has been no deliberation; certainly not so far as the delegates from New York are concerned. The resolutions of Virginia were passed on the 19th of January. New York (her Legislature being in session) appointed her delegates on the 5th of February. We came here on the 8th. Our delegation was not full for a week. The amendments proposed were submitted on the 15th. It is now the 20th of the month. We are urged to act at once, without further deliberation or delay.

To found an empire, or to make a Constitution for a people, on which so much of their happiness depends, requires the sublimest effort of the human intellect, the greatest impartiality in weighing opposing interests, the utmost calmness in judgment, the highest prudence in decision. It is proposed that we shall proceed to amend in essential particulars a Constitution which, since its adoption by the people of this country, has answered all its needs, with a haste which to my mind is unnecessary, not to say indecent.

Have any defects been discovered in this Constitution? I have listened most attentively to hear those defects mentioned, if any such have been found to exist. I have heard none. No change in the judicial department is suggested. The exercise of judicial powers under the Constitution has been satisfactory enough to the South. The judicial department is to be left untouched, as I think it should be. You propose no change in the form of the executive or legislative departments. These you leave as they were before. What you do propose is, to place certain limitations upon the legislative power, to pro-

hibit legislation upon certain important subjects, to give new guarantees to slavery, and this, as you admit, before any person has been injured, before any right has been infringed.

There is high authority which ought to be satisfactory to you, that of the President of the United States, now in office, for the statement that Congress never undertook to pass an unconstitutional law affecting the interests of slavery except the Missouri Compromise. Well, you have repealed that. You have also every assurance that can be given, that the Administration about coming into power proposes no interference with your institutions within State limits. Can you not be satisfied with that? No. You propose these amendments in advance. You insist upon them, and you declare that you must and will have them, or certain consequences must follow. But, gentlemen of the South, what reasons do you give for entering upon this hasty, this precipitate action? You say it is the prevailing sense of insecurity, the anxiety, the apprehension you feel lest something unlawful, something unconstitutional, may be done. Yet the gentleman from Virginia (Mr. Seddon) tells us that Virginia is able to protect all who reside within her limits, and that she will do so at all hazards. Why not tell us the truth outright? It is not action under the Constitution or in Congress that you would prevent. What is it, then? You are determined to prevent the agitation of the subject. Let us understand each other. You have called us here to prevent future discussion of the subject of slavery. It is *that* you fear—it is *that* you would avoid—discussion in Congress, in the State Legislatures, in the newspapers, in popular assemblies.

But will the plan you propose, the course you have marked out, accomplish your purpose? Will it stop discussion? Will it lessen it in the slightest degree? Can you not profit by the experience of the past? Can you prevent an agitation of this subject, or any other, by any constitutional provisions? No! Look at the details of your scheme. You propose through the Constitution to require payment for fugitive slaves—to make the North pay for them. You are thus throwing a lighted fire-brand not only into Congress, but into every State Legislature, into every county, city, and village in the land.

This one proposition to pay for fugitive slaves will prove a



subject for almost irrepressible agitation. You say to the State Legislatures, "You shall not obstruct the rendition of fugitives from service, but you may legislate in aid of their rendition"—thereby implying that the latter kind of legislation will be their duty. You thus provide a new subject of discussion and agitation for all these Legislatures. In the border States especially, such as Ohio and Pennsylvania, you will find this agitation fiercer than any you have hitherto witnessed, of which you complain so much. You will add to the flame until it becomes a consuming fire.

You propose to stop the discussion of these questions by the press. Do you really believe that in this age of the world you can accomplish that? You know little of history if such is your belief. Free speech is stronger than constitutions or dynasties. You might as well put your hands over the crater of a burning volcano, and seek thus to extinguish its flames, as to attempt to stop discussion by such an amendment of the Constitution. Stop discussion of the great questions affecting the policy, strength, and prosperity of the Government! You can not do it! You ought not to attempt to do it!

I wish to speak kindly upon this subject. I entertain no unfriendly feelings toward any section. But while you are thus complaining of us in the free States, because we agitate and discuss the question of slavery, are you not, in a great degree, responsible for this agitation yourselves? Do you not discuss it and agitate it? Do you not make slavery the subject of your speeches in the South, and in the presence of your slaves? Do you not make charges against us, which in your cooler moments you know to be unfounded? Do you not charge us in the hearing of your slaves with the design of interfering with slavery in the States, with a design to free them if we succeed?

You have done all this and more, and, if discontent, anxiety, and mistrust exist among your people, let me say that such discussion has contributed more to produce them than all the agitation of the slavery question at the North. But your amendments are not pointed at your discussions. That kind of agitation may go on as before. It is only the discussion on the other side you would repress!

If the condition of affairs among you is as you represent it,

have you no duties to perform; is there nothing for you to do? Should you not tell your people what we have assured you upon every proper occasion, that the Republican party has always repudiated all intention of interfering with slavery, or any other Southern institution, within the States? This you all know. Have you told your people this? If you would explain it to them now, would they not be quieted? Do not reply that they *believe* we have such a purpose. Who is responsible for that belief? Have you not continually asserted before your people, notwithstanding every assurance we could give you to the contrary, that we are determined to interfere with your rights? It is thus the responsibility rests with you.

Although such is my conviction, supported, as I think, by all the evidence, I am still for peace. Show me now any proposition that will secure peace, and I will go for it if I can. We came here to take each other by the hand, to compare views, explain, consult. We meet you in the most reasonable spirit. Anything that honorable men *may* do, we *will* do.

We will go back to 1845 when you admitted Texas; back to the Missouri Compromise of 1820. You certainly can complain of nothing previous to that time. If, since then, there has been any law of Congress passed which is unjust toward you, which infringes upon your rights, which operates unfairly upon your interests, we will join you in securing its repeal. We will go further. If you will point out any act of the Republican party which has given you just cause for apprehension, we will give you all security against it. We will do anything but amend the fundamental law of government. Before we do that we must be convinced of its necessity.

When you propose essential changes in the Constitution you must expect that they will be subjected to a critical examination; if not here, certainly elsewhere. I object to those proposed by the majority of the committee—

1. For what they *do* contain.
2. For what they *do not* contain.

I do not propose to criticise the language used in your propositions of amendment. That would be trifling. I think the language very infelicitous, and, if I supposed those propositions were to become part of the Constitution, I should think many

verbal changes indispensable. But I pass by all that, and come at once to the substance.

I object to the propositions, sir, because they would put into the Constitution new expressions relating to slavery, which were sedulously kept out of it by the framers of that instrument—left out of it, not accidentally, but because, as Madison said, they did not wish posterity to know from the Constitution that the institution existed.

But I object further, because the propositions contain guarantees for slavery which our fathers did not and would not give. In 1787 the Convention was held at Philadelphia to establish our form of government. Washington was its presiding officer, whose name was in itself a bond of union. It was soon after the close of a long and bloody war. Shoulder to shoulder—through winter snows and beneath summer suns—through such sufferings and sacrifices as the world had scarcely ever witnessed—the people of these States, under Providence, had fought and achieved their independence. Fresh from the field, their hearts full of patriotism, determined to perpetuate the liberties they had achieved, the people sent their delegates into the Convention to frame a Constitution which would preserve to their posterity the blessings they had won.

These delegates, under the presidency of Washington, aided by the counsels of Madison and Franklin, considered the very questions with which we are now dealing, and they refused to put into the Constitution which they were making such guarantees to slavery as you now ask from their descendants. That is my interpretation of their action. Either these guarantees are in the Constitution, or they are not. If they are there, let them remain there. If they are not there, I can conceive of no possible state of circumstances under which I would consent to admit them.

Mr. MOREHEAD: Not to save the Union?

Mr. FIELD: No, sir—no! That is my comprehensive answer.

Mr. MOREHEAD: Then you will let the Union slide?

Mr. FIELD: No, never! I would let slavery slide, and save the Union. Greater things than this have been done. This year has seen slavery abolished in all the Russias.

Mr. ROMAN: Do you think it better to have the free and slave States separated, and to have the Union dissolved?

Mr. FIELD: I would sacrifice all I have—lay down my life, for the Union. But I will not give these guarantees to slavery. If the Union can not be preserved without them, it can not long be preserved with them. Let me ask you if you will recommend to the people of the Southern States, in case these guarantees are conceded, to accept them, and abide by their obligations to the Union? You answer, Yes! Do you suppose you can induce the seceded States to return? You answer, We do not know! What will you yourselves do, if, after all, they refuse? Your answer is, "*We will go with them.*"

We are to understand, then, that this is the language of the slave States, which have not seceded, toward the free States: "If you will support our amendments, we will try to induce the seceded States to return to the Union. We rather think we can induce them to return; but, if we can not, then we will go with them."

What is to be done by the Government of the United States while you are trying this experiment? The seceded States are organizing a government with all its departments. They are levying taxes, raising military forces, and engaging in commerce with foreign nations, in plain violation of the provisions of the Constitution. If this condition of affairs lasts six months longer, France and England will recognize theirs as a government *de facto*. Do you suppose we will submit to this, that we can submit to it?

I speak only for myself. I undertake to commit no one but myself; but I here declare that an Administration which fails to assert by force its authority over the whole country will be a disgrace to the nation. There is no middle ground; we must keep this country unbroken, or we give it up to ruin!

We are told that one State has a hundred thousand men ready for the field, and that if we do not assent to these propositions she will fight us. If I believed this to be true, I would not consent to treat on any terms.

From the ports of these seceded States have sailed all the filibustering expeditions which have heretofore disgraced this land. There have those enterprises been conceived and fitted out. Their new government will enter upon a career of conquest unless prevented. Even if these propositions of amend-

ment are received and submitted to the people, I see nothing but war in the future, unless those States are quickly brought back to their allegiance.

I do not propose to use harsh language. I will not stigmatize this Convention as a political body, or assert that this is a movement toward a revolution counter to a political revolution just accomplished by the elections. Nor will I speak of personal liberty bills, or of Northern State legislation, about which so much complaint has been made. If I went into those questions, much might be said on both sides. We might ask you whether you had not thrown stones at us?

Did not the Governor of Louisiana, in his message to the Legislature of his State, recommend special legislation against the supporters of Mr. Lincoln? Is there not on the statute-book of Maryland a law which prohibits a "Black Republican" from holding certain offices in that State?

MR. JOHNSON: There was a police bill before the Legislature of Maryland, in which some provision of that kind was inserted by one who wished to defeat it. Its friends were compelled to accept the provision in order to save the bill. The courts at once held the provision unconstitutional. All that is so.

MR. FIELD: I am answered. It is admitted that the Legislature of that ancient State did place upon her statute-book an act passed with all the forms of law, containing a provision so insulting to millions of American citizens.

MR. HOWARD: Will Mr. Field permit me a single question? I ask it for information, and because I am unable to answer it myself. I therefore rely upon his superior judgment and better means of knowledge. It appears to me that Massachusetts, Maine, and New York have gone much further. The charge is a serious one. Maryland has never refused to submit to the decisions of the proper judicial tribunals. The Constitution has provided for the erection of a tribunal which should finally decide all questions of constitutional law. That tribunal has decided that the people of the slave States have a legal right to go into the Territories with their property. The gentleman from New York tells us he is in favor of free territory, and his people are also.

Now, I wish to ask where in the Constitution he finds the

right to appeal from the decision of the Supreme Court to the popular voice? In what clause of the Constitution is this power lodged? Where does he find this right of appeal to the people, a right which he insists the North will not give up?

Mr. FIELD: I am happy to answer the question of the gentleman from Maryland, and I reply that, when once the Supreme Court has decided a question, I know of no way in which the decision can be reversed, except through an amendment of the Constitution. I have the greatest respect for the authority of the Supreme Court. I would take up arms, if necessary, to execute its decisions. I say that States, as well as persons, should respect and conform to its judgments, and I would say they must. But I am bound in candor to add that, in my view, the Supreme Court has never adjudged the point to which the gentleman refers; it gave opinions, but no decision.

I was about to state, when I was first interrupted, that the majority report altogether omits those guarantees which, if the Constitution is to be amended, ought to be there before any others that have been suggested. I mean those which will secure protection in the South to the citizens of the free States, and those which will protect the Union against future attempts at secession; guarantees which are contained in the propositions that I have submitted as proper to be added to the report of the majority.

But, sir, I must insist that, if amendments to the Constitution are required at all, it is better that they should be proposed and considered in a general convention. Although I do not regard this Conference as exactly unconstitutional, it is certainly a bad precedent. It is a body nominally composed of representatives of the States, and is called to urge upon Congress propositions of amendment to the Constitution. Its recommendations will have something of force in them; it will undoubtedly be claimed for them in Congress that they possess such force. I do not like to see an irregular body sitting by the side of a legislative body and attempting to influence its action.

Again, all the States are not here. Oregon and California—the great Pacific dominions, with all their wealth and power, present and prospective—have not been consulted at all. Will

it be replied that all the States can vote upon the amendments? That is a very different thing from proposing them. California and Oregon may have interests of their own to protect, propositions of their own to make. Is it right for us to act without consulting them? I will go for a convention, because I believe it is the best way to avoid civil war.

Mr. WICKLIFFE: If a general convention is held, what amendments will you propose?

Mr. FIELD: I have already said that I have none to propose. I am satisfied with the Constitution as it is.

Mr. WICKLIFFE: Then, for God's sake, let us have no general convention!

Mr. FIELD: I think the gentleman's observation is not logical. He wants amendments, I do not. But I say, if we are to have them, let us have them through a general convention.

And I say, further, that this is the quickest way to secure them. If a general convention is to be called, let it be held at once, just as soon as possible. If gentlemen from eight of the States in this Conference represent truly the public sentiment of their people, as I will assume they do, there is no other alternative. We must have either the arbitrament of reason or the arbitrament of the sword. The gloomy future alone can tell whether the latter is to be the one adopted. I greatly fear it is. The conviction presses upon me in my waking and my sleeping hours. Only last night I dreamed of marching armies and news from the seat of war. [A laugh from the Kentucky and Virginia benches.]

The gentlemen laugh. I thought they, too, had fears of war. I thought their threats and prophecies were sincere. God grant that I may not hereafter have to say, "I had a dream that was not all a dream!"

Sir, I have but little more to trouble you with. In what I have said I trust there has been no expression that will be taken in ill part. I have spoken what I sincerely felt. If there has been an unkind word in my remarks I did not intend it, and am sorry for having uttered it.

For my own State and for the North I have only to say that they are devoted to the Union. We have been reminded of Hamilton's opinion that the States are stronger than the

Union, and that when the collision comes the Union must fall. This is a mistake. In the North the love for the Union is the strongest of political affections. New York will stand by the flag of the country while there is a star left in its folds. If the Union should be reduced to thirteen States—if it should be reduced to three States—if all should fall away but herself, she will stand alone to bear and uphold that honored flag, and recover the Union of which it is the pledge and symbol. God grant that time may never come, but that New York may stand side by side with Kentucky and Virginia to the end! That we may all stand by the Union, negotiate for it, fight for it, if the necessity comes, is my wish, my hope, my prayer. The Constitution made for us by Washington, Franklin, Madison, and Hamilton, and the wise and patriotic men who labored with them, is good enough for us. We stand for the country, for the Union, for the Constitution.

I found yesterday upon my table a pamphlet bearing the title of "The Governing Race." It contains a sublime passage from Longfellow's poem of "The Ship," which, as it closes the pamphlet, shall also close my observations :

"Thou, too, sail on, O ship of state!  
Sail on, O Union, strong and great!  
Humanity with all its fears,  
With all the hopes of future years,  
Is hanging breathless on thy fate!  
We know what Master laid thy keel,  
What workmen wrought thy ribs of steel,  
Who made each mast, and sail, and rope,  
What anvils rang, what hammers beat,  
In what a forge and what a heat  
Were shaped the anchors of thy hope!  
Fear not each sudden sound and shock,  
'Tis of the wave and not the rock;  
'Tis but the flapping of the sail,  
And not a rent made by the gale!  
In spite of rock and tempest's roar,  
In spite of false lights on the shore,  
Sail on, nor fear to breast the sea!  
Our hearts, our hopes, are all with thee,  
Our hearts, our hopes, our prayers, our tears,  
Our faith triumphant o'er our fears,  
Are all with thee—are all with thee!"



## PLAN OF A CONSTITUTION.

In May, 1867, Mr. Field published suggestions as to the revision of the New York Constitution, then pending, with the following introduction:

"Apology from an American citizen, for making suggestions respecting any matter of public concern, would be out of place at any time, and more than ever when they relate to a matter of such magnitude as a revision of the Constitution of government of a great Commonwealth. Those which are here thrown out may prove to be of little value; but even little is better than nothing, and, if anything is suggested which may happen to be serviceable to the Convention, or may help to form a correct public opinion, or even excite greater interest in the subject, I shall have done the work of a good citizen.

"Instead of making these suggestions separately, I have thought it better to put them into the form of a plan of a Constitution. What is new and what is old will be readily perceived by those who are conversant with our present Constitution and with the Constitutions of other States. They will see that the portions which relate to the finances of the State and the title to land are taken from the previous Constitution unchanged, except in the form of expression, as there appeared to be an opportunity for condensation."

WE, the people of the State of New York, acknowledging with gratitude the beneficence of Almighty God in permitting us deliberately and peaceably, without fraud, violence, or surprise, to choose and form our own institutions, do hereby, in order to insure to ourselves and our posterity the blessings of freedom and order, establish this Constitution of government for the State of New York.

### PART I.—FOUNDATION OF GOVERNMENT

§ 1. All men are born free and equal in natural rights. Some of these rights are inalienable, and among them the right to life, to liberty, to property, and to the pursuit of happiness; none of which can rightfully be surrendered, or taken away or abridged, in respect to any person, except in such measure as may be necessary to reconcile them with the equal rights of others or in punishment for crime.

§ 2. The end of political society is to protect and assist its

members in the enjoyment of their natural rights, so that each may enjoy his own in their highest development, without infringing upon those of others.

§ 3. The origin of political society is a compact, tacit or expressed, by which the whole people covenants with each person, and each person with the whole people, that all shall be governed for the common end.

§ 4. This State is a political society, independent of all others, except so far as its people with their consent have become subordinate to the United States, upon the terms of the Federal Constitution.

§ 5. The sovereignty of the people of this State is qualified only by the sovereignty of the United States in matters within their exclusive authority, under the Federal Constitution.

§ 6. Each member of this State owes a double allegiance: one to the United States in matters comprehended within the Federal Constitution; the other to this State in all matters not comprehended within that Constitution: the allegiance in both cases is absolute; that to the United States can not be withdrawn without the consent of the people of the United States, and that to this State can not be withdrawn without the consent of the people of this State.

§ 7. Sovereignty resides in the whole body of the people; all power under God is derived from them; no authority can be exercised over any citizen but such as comes from them, and they may alter or abolish their government at pleasure.

§ 8. It is nevertheless a fundamental maxim of free government that the people in their sovereign capacity act in no other manner than by establishing or changing their Constitution, and even then only by a solemn and authentic act of the whole people.

§ 9. The government of this State is purely representative, and the object of this Constitution is, as that of every republican government must be, to secure intelligence and honesty in the magistracy, and to define and limit their authority.

§ 10. A Constitution is the supreme law, for all times and circumstances, in war as in peace; and so long as it stands unchanged it must receive absolute obedience from the whole

people, and from every individual person in what place, office, or condition soever.

§ 11. The State is perpetual, and a change in the form of its government works no change in the laws or obligations of the State, except by express provision of the Constitution.

§ 12. All persons born in this State and resident therein, and all citizens of the United States resident in this State, constitute the people of the State, and every such person is a citizen and member of the State.

§ 13. Though sovereignty resides in the whole body of the people, they may nevertheless rightfully delegate the choice of their magistracy to a lesser number.

§ 14. In this State the elective franchise is confided to all [male] citizens of the age of twenty-one years, who have been citizens and residents of the State for one year next before the election, except—

1. Those who have been convicted of infamous crime.
2. Those who have been judicially declared to be of unsound mind.
3. Those who have made or become interested in a wager upon the result of the election.
4. Those who belong to a secret political association.
5. Those who have paid or furnished money or other valuable thing to influence an elector of this State in his vote, or to procure a nomination to office, or to influence a public officer in his official action, and those who have received any such money or thing.
6. Those who at the time of the election are, or within one month previous thereto have been, public paupers, or prisoners under sentence for crime.

§ 15. For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States; nor while engaged in the navigation of the waters of this State, or of the United States, or of the high-seas; nor while a student in a seminary of learning; nor while kept at an almshouse, or other asylum, at the public expense; nor while confined in a public prison.

§ 16. The registration of all persons entitled to vote at an

election shall be made at least three days before the election, in such manner and upon such reasonable proof as may be prescribed by law.

§ 17. All elections must be by ballot, except for such town officers as may be directed by law to be otherwise chosen. The ballot may be deposited by the elector in person, or transmitted with his indorsement duly authenticated in such manner as may be prescribed by law.

## PART II.—FRAME OF GOVERNMENT.

§ 18. The government of this State shall be vested in three separate departments, legislative, executive, and judicial, all of which conjointly form the government. These departments must be kept distinct, so that none shall exercise the powers properly belonging to another department, except as expressly provided by the Constitution. And no person holding office under one department shall at the same time exercise functions properly belonging to either of the others.

### ARTICLE I.—THE LEGISLATIVE DEPARTMENT.

§ 19. The legislative power of the government of this State shall be vested in a Senate and House of Representatives, which together shall be called the General Assembly of the State of New York.\*

§ 20. The Senate shall consist of thirty-two members.

\* General Assembly was the name formerly given to the legislative body of New York. See the Dongan charter granted to the city of New York, § 7, and the Act of 1782, confirming the charter, § 5. It seems fitter than "Legislature," which is a generic expression, equally applicable to every kind of legislative body. "Assembly" is also more convenient for citation. Act of Assembly, like Act of Congress, is a better expression than Act of the Legislature.

The legislative body is called the General Assembly in Vermont, Rhode Island, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Tennessee, Kentucky, Ohio, Indiana, Illinois, Missouri, Arkansas, and Iowa. In Oregon it is called the Legislative Assembly. The Lower House is called the House of Representatives in every State of the Union but seven, and in four only of these is it called the Assembly—that is to say, in New York, New Jersey, Wisconsin, and California. In these, and four others, viz., Michigan, Minnesota, Mississippi, and Texas, the whole body is named Legislature.

§ 21. The State shall be divided into eight Senate districts. Until the rearrangement after the next State census, the city and county of New York shall constitute the first district; the counties of Richmond, Suffolk, Queens, Kings, Westchester, Orange, Rockland, Putnam, and Dutchess, the second; the counties of Columbia, Sullivan, Ulster, Greene, Albany, Schoharie, and Rensselaer, the third; the counties of Warren, Saratoga, Washington, Essex, Franklin, St. Lawrence, Clinton, Montgomery, Hamilton, Fulton, and Schenectady, the fourth; the counties of Onondaga, Oneida, Oswego, Herkimer, Jefferson, and Lewis, the fifth; the counties of Otsego, Delaware, Madison, Chenango, Broome, Tioga, Chemung, Tompkins, Cortland, and Schuyler, the sixth; the counties of Livingston, Wayne, Seneca, Yates, Ontario, Steuben, Monroe, and Cayuga, the seventh; the counties of Erie, Chautauqua, Cattaraugus, Orleans, Niagara, Genesee, Allegany, and Wyoming, the eighth.

§ 22. Each Senate district shall elect four Senators, whose term of office shall be four years, except that the Senators first elected shall be classified by lot, so that one Senator in each district shall go out of office every year.

§ 23. A census of the State shall be taken every ten years, beginning in 1875, at which an enumeration of all the inhabitants shall be taken; and, at the first session of the Legislature after each census, the Senate districts shall be rearranged, so that each, consisting of contiguous territory, shall contain as nearly as may be an equal number of inhabitants; but no county shall be divided in the formation of a Senate district, unless it contains a population sufficient for two or more districts.

§ 24. Representatives shall be annually elected. Every elector may vote for one Representative, and any citizen of the State who shall receive at a general election twenty-five hundred votes, or more, for the office, shall be a member of the House of Representatives for the ensuing year.\*

\* That our present system of representation works badly, scarce any one is bold enough to deny. How we are to get a better is the only question. The plan here given offers these advantages:

1. It will go far to destroy the present most demoralizing method of nomination; which seems to have been curiously contrived to give the people the semblance of a choice, while it takes from them the substance.

2. It will give to minorities representatives proportioned to their numbers. The

§ 25. A majority of each House shall constitute a quorum to do business. Each shall be the judge of the elections, returns, and qualifications of its own members; shall determine the rules of its own proceedings and choose its own officers, except that the Lieutenant-Governor shall preside over the Senate. In his absence, the Senate shall choose a temporary President.

§ 26. For any speech or debate in either House, the members shall not be questioned in any other place.

§ 27. Each House must keep a journal of its proceedings, and publish the same, except such parts as may require secrecy. The doors of each House must be kept open, except when the public welfare may require secrecy. Neither, without the consent of the other, can adjourn for more than two days.

§ 28. Every bill must be printed, and a copy laid upon the table of each member or otherwise furnished to him, at least twenty-four hours before its final passage; and no amendment shall be made within that time. But these restrictions may be waived by unanimous consent.

present plan fails in this respect entirely, since it is now possible for one party, with a majority in the whole State of only one hundred and twenty-eight, to elect every member of the Lower House.

3. It will encourage a higher tone in public men. It must be admitted that those who most strive to be popular, the time-serving, the timid, are now most likely to be elected. By the adoption of this plan, the independent citizen will lose nothing by his independence, and, if he has impressed himself upon the minds of thinking men, he will be likely to have a voice in the public councils.

4. The localization of candidates, which now leads to so much inconvenience, will have to give way to a more general and liberal plan. Parties may often be, as now, divided in part territorially. Yet in a portion of the State, where a party is in a hopeless minority, there may be as able men belonging to it as in any other; but, under our present method, their voices never can be heard in the legislative councils. There may be as able Democrats in St. Lawrence as in New York, and as able Republicans in New York as in St. Lawrence; but at present the State can not have the services of one of them at the capital. Surely this is wrong.

5. The practical working of the plan would probably be this: There are seven hundred and fifty thousand voters in the State. Any citizen, be he in New York, in St. Lawrence, or in Chautauqua, who has the confidence of twenty-five hundred voters, living anywhere in the State, might be made their representative; and, if the votes were equally distributed, there would be three hundred representatives. The number would be less as the distribution became unequal.

6. By thus giving representation to the minority, we avoid the necessity of provisions so common in Constitutions, and so inadequate at best, requiring a two-thirds or three-fifths vote in certain cases.

§ 29. A private or local statute must embrace only one subject, and that must be expressed in the title.

§ 30. A special statute can not be passed to create or change a corporation, and all statutes for the creation, modification, or regulation of corporations, must be general in their provisions.

§ 31. Every statute which imposes, continues, or revives a tax must, without reference to any other statute, state distinctly the tax and the object to which it is to be applied.

§ 32. Every statute which makes a new appropriation, or continues or revives an appropriation, must distinctly specify the sum appropriated, and the object to which it is to be applied, without referring to any other statute to fix the sum.

§ 33. No bill can be passed without the assent of a majority of all the members elected to each House; the question upon the final passage must be taken immediately upon its last reading, and the yeas and nays must be entered on the journal.

§ 34. The enacting clause of all bills shall be, "The People of the State of New York, represented in General Assembly, do enact as follows"; and no law can be enacted except by bill.

§ 35. Every appointment to a civil office in this State, of a member of either House of the General Assembly, made by the Governor, during the term for which such member was elected, shall be void.

§ 36. No person holding an office under the United States can hold a seat in the General Assembly. And, if any person after his election as a member thereof is elected or appointed to an office under the United States, his acceptance thereof shall vacate his seat.

§ 37. The members of the General Assembly shall receive for their services such compensation as may be fixed by law. But no such law can take effect until the first day of January succeeding its enactment; except that the General Assembly, at its first session after the adoption of this Constitution, may fix the compensation of the members for that session.

## ARTICLE II.—THE EXECUTIVE DEPARTMENT.

§ 38. The executive power of the government of this State shall be vested in a Governor, who shall hold his office for two

years. A Lieutenant-Governor shall be chosen at the same time and for the same term.

§ 39. No person shall be eligible to the office of Governor or Lieutenant-Governor, except a citizen of the United States, of the age of at least thirty years, who has been for five years next before his election a resident within this State.

§ 40. The persons respectively having the highest number of votes for Governor and for Lieutenant-Governor, shall be elected; but in case two or more have an equal and the highest number of votes for Governor or for Lieutenant-Governor, the two Houses of the General Assembly at its next annual session shall forthwith, by joint ballot, choose one of those persons.

§ 41. The Governor and Lieutenant-Governor shall at stated times receive for their services a compensation to be established by law, which shall neither be increased nor diminished after their election and during their continuance in office.

§ 42. The Governor shall be commander-in-chief of the military and naval forces of the State. He shall give to the General Assembly, by message, at every session, information of the condition of the State, and recommend such measures as he may judge expedient. He may on extraordinary occasions convene both Houses, or the Senate alone. He shall take care that the laws are faithfully executed.

§ 43. The Governor shall nominate, and with the consent of the Senate appoint, all officers of the State, civil or military, whose appointments are not herein otherwise provided for. But the General Assembly may vest the appointment of such inferior officers as it may think proper, in the Governor alone, in the courts of law, or in the heads of such executive departments as it may from time to time establish.\*

\* The unity of the Executive should not be a question with those who are conversant with the existing governments of the State and city. Intelligence, honesty, singleness of purpose, and responsibility, are the requisites for an executive officer. Intelligence and honesty are better obtained when the attention of the electors is concentrated upon a single person than when it is distracted with the choice of several. Singleness of purpose in the execution of the laws can not be secured if there are many minds tending in different directions, and many wills to thwart each



§ 44. The Governor shall have power to grant reprieves, commutations, and pardons, after conviction, otherwise than upon impeachment, for all offenses except treason, upon such conditions and with such limitations as he may think proper, subject to any regulation which may be provided by law respecting the manner of applying therefor. Upon conviction for treason, he shall have power to suspend the execution of a capital sentence until thirty days after the opening of the next session of the General Assembly, which may dispose thereof in its discretion. He shall annually report the particulars of his action in each case of reprieve, commutation, or pardon, in such manner as may be prescribed by law.

§ 45. The Governor shall have a qualified negative upon legislation as follows: Every bill which passes the General Assembly shall be presented to him. If he approve, he shall sign it, and it shall then become a law. If he does not approve the bill, he shall return it, with his objections, to the House where it originated, which shall enter the objections at large on its journal, and reconsider the bill. If, thereupon, two thirds of the members present, being a majority of all the members elected to that House, agree to its passage, it shall be sent, with the objections, to the other House, by which it shall likewise be reconsidered; and, if there approved by a like vote, it shall then become a law. A bill not returned by the Governor within ten days (excluding Sundays) after it has been presented to him, shall at the end of that time become a law, in like manner as if he had signed it, unless the General Assembly by adjournment prevent its return, and then it shall not be a law, unless signed by him within ten days after such adjournment.

§ 46. In case of the impeachment of the Governor, or his removal from office, or his death, resignation, absence from the

other. Responsibility divided among many is dispersed, and practically lost, as our experience demonstrates.

The people, those who desire good laws, faithfully administered, have as much as they really care for and as much as they can do well, when they elect their sole responsible Executive and their whole legislative body. It is only the politicians who want a great many officers elected by the people, that they may trade upon the nominations in their party conventions. The question is simply between the real good of the people and the seeming good of the politicians. There ought to be no doubt which shall win.

State, or other inability to discharge the powers and duties of the office, those powers and duties shall devolve upon the Lieutenant-Governor for the residue of the term, or until the disability ceases. But when the Governor, with the consent of the General Assembly, is out of the State in time of war, at the head of a military force thereof, he shall continue commander-in-chief of all the military forces of the State.

§ 47. The Lieutenant-Governor shall be President of the Senate, but shall have only a casting vote therein. If, during a vacancy in the office of Governor, the Lieutenant-Governor be impeached, or removed, or die, resign, be absent from the State, or become otherwise unable to discharge the powers and duties of the office of Governor, the President of the Senate shall take upon himself those powers and duties until the vacancy is filled or the disability cease.

### ARTICLE III.—THE JUDICIAL DEPARTMENT.

§ 48. The judicial power of the government of this State shall be vested in one Supreme Court, and in such inferior courts as the General Assembly may from time to time establish.\*

§ 49. The Judges, both of the Supreme and the infe-

\* The plan of electing the Judges by popular vote, for short terms, has been found to be fruitful of evils. A worse plan could scarcely be contrived to degrade the judiciary and render justice uncertain. There is no occasion to enumerate these evils; we have only to look about us to see them. There must be a change.

What shall the change be? Two or three conditions are essential. *In the first place*, the police justices and Judges of other inferior criminal courts can not continue to be elective, without throwing the city of New York into a condition of practical anarchy. *In the next place*, the Judges of the higher court can not continue to be elective *by districts*, without leaving the city of New York under the control of the most corrupt political machinery. *In the third place*, the tenure of the office must be changed, if we would have an independent judiciary.

The best of all practicable schemes should seem to be that of the Federal Constitution—Judges appointed by the Executive, and holding during good behavior. If experience is worth anything, it proves that.

There does not appear to be any good reason why the details of a judicial establishment should be settled by the Constitution. They may safely be left to the legislative department, if provision is made for the permanence and independence of the tribunals when once established. The wants of the people from time to time, as population increases and business takes new channels, will be in this manner best consulted.

rior Courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation, which shall not be diminished during their continuance in office.

§ 50. The Supreme Court shall consist of seven or more Judges, one of whom shall be commissioned as Chief-Justice.

§ 51. An inferior court once established shall not be abolished without assigning the Judges thereof to other judicial duties, with at least equal compensation.

§ 52. The Judges of the Supreme Court may be removed by resolution of the General Assembly, if a majority of all the members elected to each House concur therein. All other judicial officers may be removed by the Senate on the recommendation of the Governor. No removal shall be made by virtue of this section, unless the cause thereof be entered on the journals, nor unless the person proceeded against has been served with a copy of the charge against him, and has had an opportunity to be heard in his defense. On the question of removal, the yeas and nays shall be entered on the journals.

§ 53. An impeachment of any civil officer may be made by the vote of a majority of all the members elected to the House of Representatives, and shall be tried by a court consisting of the Lieutenant-Governor (except when the Governor is impeached), the Senate, and the Supreme Court; a majority of each being necessary to a quorum. Before proceeding to the trial, the members of the Court shall take an oath or affirmation truly and impartially to try the impeachment, according to the evidence; and no conviction shall be had without the concurrence of two thirds of the members present.

§ 54. No officer shall exercise his office after his impeachment, until his acquittal.

§ 55. Judgment in case of impeachment shall not extend further than to removal from office and disqualification to hold any office under this State, but the party impeached shall be liable to indictment and punishment according to law.

§ 56. No Judge, except a justice of the peace, shall hold any other office or public trust under the Government of the United States, of this State, or of any other State or country.

## PART III.—INSTRUCTIONS AND LIMITATIONS.

## ARTICLE I.—DIRECTIONS TO THE LEGISLATIVE DEPARTMENT.

§ 57. The General Assembly first chosen under this Constitution shall at its first session pass statutes as follows :

[1.] A statute for determining by reasonable proof who are entitled to vote at any election, and for the registration of their names at least three days before the election.

[2.] The Civil and Penal Codes heretofore reported by the Commissioners of the Code, or such portions of them as after examination in detail shall appear to be proper for enactment.

[3.] A statute providing for the incorporation of cities and villages for local government, whenever the population reaches a certain number within a certain territory.

[4.] A statute providing for the incorporation of any three or more persons for any other lawful business or purpose.\*

[5.] A statute providing for a public hearing, before the proper committees, of persons advocating or opposing the passage of any bill, and for preventing by adequate penalties the soliciting of votes from members of the General Assembly in any other manner.

[6.] A statute providing for the compulsory attendance at a public or private school, for a least three months of every year, of every child between the ages of eight and sixteen, whose health will permit its attendance.

[7.] A statute providing for the enrollment in the militia of all able-bodied male citizens between the ages of eighteen and forty-five, with the exceptions mentioned in this Constitution, and such further exceptions as may be deemed necessary; requiring every person enrolled to furnish himself

\* If it should be thought that the fourth subdivision of this section would open the door too wide for corporations of every kind, it is to be observed that the experience of England justifies it. The English "Companies Act" of 1862 provides that "any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requirements of this act, in respect of registration, form an incorporated company, with or without limited liability."

with arms, and dividing the militia into at least two classes, one of which, consisting of not less than one hundred thousand men, shall be at all times officered, disciplined, and in readiness for service, and all others shall be so arranged as to be capable of ready organization. The same statute shall provide for the establishment of arsenals, containing munitions of war sufficient for the use of all the militia in case of emergency.

§ 58. If the General Assembly first elected does not, at its first session, pass the statutes mentioned in the last section, the Governor shall immediately call an extra session, which shall continue until the statutes are passed.

§ 59. The statutes mentioned in the last two sections shall be subject to repeal, or modification from time to time; but, in case of repeal new statutes on the same subject and with the like intent shall be substituted therefor. And all corporations that have been heretofore created, or that may be hereafter created, under the authority of this State, may be at any time dissolved, or their franchises withdrawn by the General Assembly.

#### ARTICLE II.—RESTRAINTS UPON THE GOVERNMENT.

§ 60. The freedom of religious profession and worship, without discrimination or preference, is guaranteed to every person within this State. No one, by reason of his opinions on matters of religion, shall be held incompetent to vote, to hold office, or to testify. But the freedom thus guaranteed shall not excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State.

§ 61. No law can be passed to restrain or abridge the liberty of speech or of the press; for every citizen may freely speak, write, or publish his thoughts on all subjects, being responsible for the abuse of that right. In every criminal prosecution for libel, the truth may be given in evidence to the jury, who shall determine both the law and the fact; and if it appear to them that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the accused shall be acquitted.

§ 62. No person shall be deprived of life, liberty, or property, without due process, according to standing laws.

§ 63. Justice must not be denied to any person, nor deferred; and none can be refused due process on payment of the fees established by law.

§ 64. The right of trial by jury, in all cases in which it has been heretofore used, shall remain inviolate for ever; but this right may be waived by the parties in civil cases, in the manner prescribed by law.

§ 65. The privilege of the writ of *habeas corpus* can not be suspended except by the General Assembly; and by that only when, in case of invasion of this State, or rebellion against it, the public safety may require the suspension.

§ 66. No person shall be held to answer for an infamous crime, unless upon presentment or indictment of a grand jury, except—

1. In case of impeachment; or

2. In case of breach of military discipline, by a member of the militia while in actual service, or by a member of the land or naval forces of this State in the time of war, or when kept by the State with the consent of Congress in time of peace; or

3. In case of petty larceny, when so provided by law.

§ 67. In all criminal prosecutions the accused shall be entitled to a speedy and public trial by an impartial jury; he shall be informed of the nature and cause of the accusation; shall be confronted with the witnesses against him; shall have compulsory process for witnesses in his favor; and may appear and defend in person and with counsel.

§ 68. No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to bear witness against himself; but he may be compelled to testify against another upon any charge or question of bribery, and if his testimony disclose a crime in himself such testimony shall not be used against him.\*

§ 69. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

§ 70. Witnesses shall not be imprisoned to assure their attendance, if they give security therefor; and, if unable to give

\* Article I, § 6, of the present Constitution, with the last clause added. This clause would remove one of the greatest difficulties now existing in procuring convictions for bribery.

the security, their testimony shall be taken in writing, before a Judge and in presence of the accused, and thereupon they shall be discharged.

§ 71. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, must not be violated; no search or seizure shall be made but upon due process, and no process shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. But this section shall not be held to prevent the arrest and temporary detention without process of a person found in the actual commission of crime.

§ 72. Private property shall not be taken from the owner for private use, except as prescribed in the next section, nor for public use without previous just compensation, to be ascertained by a jury in the manner prescribed by law.

§ 73. Private roads may be opened in the manner prescribed by law; the necessity thereof and the compensation therefor being first determined by a jury of freeholders, and the compensation thereupon paid by the person benefited.

§ 74. No citizen of this State can be compelled to pay or contribute to any tax, duty, loan, gift, or other charge, which is not laid or imposed by a law of the United States or of this State.

§ 75. The right of the people or any portion of them to assemble, to discuss public matters, and to petition the Government, or any department thereof, can not be interfered with on any pretext whatever.

§ 76. A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms can not be infringed.

§ 77. No person having religious scruples against bearing arms shall be compelled thereto, if he pay the State an equivalent in money, to be estimated according to the expense of procuring an able-bodied substitute.

§ 78. No person can in any case be subjected to martial rule, except when employed in the army or navy, or the militia in actual service.

§ 79. Retrospective laws are dangerous and unjust, and can

not be passed to the prejudice of the right or claim of any person whomsoever.

§ 80. No divorce shall be granted, except in a judicial proceeding.

§ 81. No lottery shall be authorized, nor the sale of lottery-tickets allowed.

§ 82. No banks of issue shall be hereafter established under the authority of this State.

§ 83. No money shall be paid from the Treasury of the State, or from any of the funds belonging to it or under its management, except in pursuance of an appropriation by law, nor unless such payment is made within two years after the appropriation.

#### ARTICLE III.—PROPERTY AND FINANCES OF THE STATE.

§ 84. The canals and salt-springs of the State shall not be sold; nor shall the canals be leased; nor shall the aggregate quantity of lands owned by the State, convenient for the use of the salt-springs, be diminished.

§ 85. The capitals of the common-school fund, of the literature fund, and of the United States deposit fund shall be preserved, each separate and inviolate. The revenue of the common-school fund shall be applied to the support of common schools; the revenue of the literature fund shall be applied to the support of academies; and the sum of twenty-five thousand dollars of the revenue of the United States deposit fund shall be appropriated annually to the capital of the common-school fund.

§ 86. The revenues of the State canals, in each fiscal year, shall be appropriated as follows:

1. The expenses of collection, superintendence, and ordinary repairs shall be first paid.

2. The sum of one million seven hundred thousand dollars shall be set apart as a sinking fund, to be applied to the payment of the interest and redemption of the principal of the canal debt of the State.

3. The sum of three hundred and fifty thousand dollars shall be set apart as a sinking fund, to be applied to the payment of the interest and redemption of the principal of the other debts of the State; and, after a sufficient sum has been



appropriated to pay the entire canal debt, the sum of three hundred and fifty thousand dollars shall be increased to one million five hundred thousand dollars.

4. If, by reason of priority of the sinking fund provided for the canal debt, the payment of any part of the annual sum of three hundred and fifty thousand dollars is deferred, the deficiency, with interest thereon, shall be paid to the sinking fund for the general debt, as soon as it can be done consistently with the rights of the creditors holding the canal debt.

5. The sum of two hundred thousand dollars shall be paid out of the remainder of the canal revenues, to defray the expenses of government.

§ 87. If the sinking funds mentioned in the last section, or either of them, prove insufficient to enable the State, on the credit of such fund, to procure the means of satisfying the debts of the State as they become payable, the General Assembly shall impose taxes sufficient for that purpose. Every advance to the canals, or to their debt, from any source other than their direct revenues shall, with interest, be repaid into the Treasury for the use of the State, out of the canal revenues, as soon as it can be done consistently with the rights of the creditors holding the canal debt.

§ 88. The State shall not contract a debt or liability, direct or contingent, except as follows:

1. By a law providing for a loan to meet casual deficits, or expenses not provided for; but the total amount of debt thus created shall not exceed one million dollars outstanding at any one time.

2. By a law providing for a loan to defend the State in war, or to suppress insurrection.

3. By a law specifying some single object for which the loan is to be contracted, and imposing a direct annual tax sufficient to pay the interest as it falls due, and the principal within eighteen years; which law can not take effect until it has been approved by a majority of all the electors voting thereon at a general election, held not less than three months after its passage; and the tax imposed by such law shall not be repealed or suspended, in so far as it may be necessary to provide for these payments.

§ 89. The proceeds of every loan shall be applied exclusively to the purpose for which the loan was raised, or to the repayment thereof.

§ 90. The claims of the State against a corporation for loans made or debts contracted therefor shall not be released or compromised, but shall be strictly enforced, and the money arising therefrom shall be appropriated to the sinking fund mentioned in section 86. The time limited for the fulfillment of any condition of a release or compromise heretofore made may, however, be extended by law.

#### ARTICLE IV.—TITLE OF REAL PROPERTY.

§ 91. No feudal tenure can exist in this State; saving, however, all rents and services certain, which at any time before the first day of January, 1847, had been lawfully created or reserved.

§ 92. All lands within this State are allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates.

§ 93. No lease or grant of agricultural land made since the first day of January, 1847, or at any time hereafter can be valid, if, being made for a longer period than twelve years, rent or service of any kind is reserved therein.

§ 94. All fines, quarter-sales, or other like restraints upon alienation, reserved in any grant of land made since the first day of January, 1847, or at any time hereafter, are void.

§ 95. All grants of land within this State, made by or under the authority of the King of Great Britain, since the 14th day of October, 1775, are void; but nothing in this Constitution shall affect any such grant made before that day.

#### ARTICLE V.—MISCELLANEOUS PROVISIONS.

§ 96. A delegation of official power being a sacred trust, a violation of that trust, or undue influence upon its exercise, is a flagrant crime; therefore the bribery of any member of the General Assembly, or other persons holding office under this State, shall be adjudged felony, in both the giver and the re-

ceiver of the bribe, punishable by deprivation of the right to vote or hold office, and by imprisonment in a State-prison for five years, or such further term as may be prescribed by law. An agreement or understanding of any member of the General Assembly with any other member, that either shall vote in a particular manner upon any measure, if the other will vote in a particular manner upon another measure, shall be deemed bribery. Every willful violation of this Constitution by any person holding office under it shall be subject to the same penalties as bribery.

§ 97. The General Assembly may, by general laws, and by such only, establish local governments in counties, towns, cities, and villages, with such powers, legislative and executive, as it may judge expedient; but all the officers of such local governments must be elected by the electors of such counties, towns, cities, and villages respectively, or appointed by persons thus elected.

§ 98. No military force of any kind can be kept on foot without the consent of the General Assembly; no soldier can be quartered in any house without the consent of the owner; and the military shall at all times be subordinate to the civil power.

§ 99. Claims against the State may be prosecuted in the Supreme Court by action, in the same manner as claims against a citizen; provision shall be made by law for the defense of the State in such actions; and, if judgments are finally recovered against the State, the General Assembly at its next session thereafter shall make appropriation for the payment thereof.

§ 100. Treason against the State shall consist in levying war against it, or adhering to its enemies, giving them aid and comfort. But there can be no treason in obeying the Constitution of the United States, and the laws and treaties made in pursuance thereof. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

§ 101. All officers, legislative, executive, or judicial, civil or military, except such inferior officers as may be exempted by law, shall, before they enter on the duties of their respective offices, take and subscribe an oath or affirmation in the following form:

"I do solemnly swear [or affirm, as the case may be] that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of [ ] according to the best of my ability."

No other oath, declaration, or test shall be required as a qualification for any office or public trust.

§ 102. No person shall be eligible at any election who is, by any of the six exceptions contained in section 14, disqualified from voting at such election.

§ 103. The political year and legislative term shall begin on the first day of January, and the General Assembly shall every year meet on the first Tuesday in January, unless a different day is appointed by law.

§ 104. The elections for such officers of the State as are elective by the people shall be held on the Tuesday next after the first Monday of November, unless otherwise provided by law.

§ 105. All laws and judicial decisions shall be free for publication by any person.

§ 106. In order the better to secure the inviolability of this Constitution, there shall be elected at the general election, in the year 1874, and every seven years thereafter, four councilors in each of the Senate districts, who together shall form a Council of Revision. This Council shall meet at the Capitol, on the first Monday of December following their election, to inquire whether this Constitution has been in every respect observed; whether the laws have been faithfully executed, and whether abuses have crept into any department of the government. They shall hold office till the end of the year next after their election; a majority shall be a quorum for business; they may adjourn from time to time; they shall report to the General Assembly at its first session after their election the result of their inquiries to that time, and at the next session the final result. If, in their judgment, an amendment or revision of the Constitution is desirable, they may propose amendments or call a convention for the purpose of revision. When amendments are proposed, they shall be submitted to the people at the first general election thereafter, and, if approved by a ma-

jority of the electors voting thereon, shall become a part of this Constitution. When a convention is called, the members thereof shall be elected at the next general election thereafter, by Senate districts, sixteen from each district.

§ 107. This Constitution and the Constitution of the United States shall be taught in all the public schools of this State, and a copy of both shall be delivered to every scholar during his attendance.

#### PART IV.—REPEAL OF FORMER CONSTITUTIONS.

§ 108. This Constitution shall take effect on the first day of January, 1869. The preceding Constitution shall continue in force till that day, except that—

1. Members of the General Assembly, Governor and Lieutenant-Governor, under this Constitution, shall be elected at the general election in 1868.

2. Sections 60 to 83, both inclusive, of this Constitution, shall apply to the Legislature under the preceding Constitution, on and after the first day of January, 1868.

§ 109. All officers holding office on the thirty-first day of December, 1868, except the Governor, Lieutenant-Governor, Senators, and members of Assembly, shall continue to hold their offices, and exercise the functions thereof, as they then exist, till the first day of March, 1869, and no longer.

§ 110. On the first day of March, 1869, all actions and proceedings then pending in the Court of Appeals and in the Supreme Court under the preceding Constitution, shall be transferred to the Supreme Court established under this Constitution.

§ 111. The former Constitutions of government of this State, with all their amendments, are repealed, such repeal to take effect on the first day of January, 1869, except as provided in the last two sections; but this repeal shall not revive any former law or rule heretofore repealed or abrogated, nor shall it affect any right already existing or accrued, or any proceeding already taken, except as in this Constitution provided.

## PROPORTIONAL REPRESENTATION.

Article by Mr. Field, published in "Putnam's Monthly," June, 1870.

WE call ours a popular, representative government, that is, a government of the people acting by their representatives. The theory of every law in any one of the States is expressed in the enacting clause of New York statutes, which is that "the people of the State of New York, represented in Senate and Assembly, do enact as follows." The purpose of the present essay is to show how far this is true, and, if not true, how it can be made so. It is no part of our plan to examine the reasons for regarding the theory of our institutions as the true one. That belongs properly to another discussion. We are not now to compare republican governments with those which are monarchical, nor the different kinds of either class. The fundamental principle of American polity is, that all government comes from the people, to be exercised by them, and for them. The motto supposed to be written here upon every symbol of authority is, "from the people, by the people, for the people." The conformity, or rather non-conformity, of our practice to our theory is the subject for present discussion. In pursuing it, we will, for illustration, begin with our own State, New York—that great Commonwealth which stamps the name of the supposed lawgiver upon the front of all its statutes.

Our Legislature is composed of a Senate and Assembly, the former consisting of thirty-two members, the latter of one hundred and twenty-eight. Each member of either House is chosen by the electors of a district, the limits of which may be changed every ten years, so as to make those of each class equal in population. Each district is single, and at each election the candidate having the largest number of votes is declared elected, though that number may not be a majority of all the votes belonging to the district, or even of the votes cast. If, for example, there be three candidates, two of whom receive each one third of the votes, less one, the third candidate will be chosen,

though he has received only one third of the votes, with two added. The Senate is chosen every two years, the Assembly every year. In 1868 eight hundred and eighty-one statutes were passed; in 1869 nine hundred and twenty. We now begin to perceive how truly, or rather untruly, speaks the enacting clause of each of these eighteen hundred and one statutes. Apart from the fact that the Senate chosen in the autumn of 1867 for the next two years may not be the Senate which the people would have chosen in the autumn of 1868, we see that each election may have resulted in giving the representation to a majority or plurality in each district, leaving all the rest of the voters unrepresented. Thus it may happen, and does in fact often happen, that, inasmuch as a bill may be passed by a majority of the members elected to each House, seventeen Senators and sixty-five members of Assembly may enact a law, and these eighty-two men may, in fact, hold their seats by the votes of a minority of the electors of the State. If the enacting clause were, then, to speak truly, it would run in this wise: "One third (or one fourth, or one fifth, as the case may be) of the people of the State of New York, represented in Senate and Assembly, do enact as follows."

This comes of perverting what should be a personal selection into one that is local or territorial, and makes a Legislature almost as likely to misrepresent as to represent the will of the people. Let us see how the system works.

We will look at the State governments first, and the Federal Government afterward. In doing so, we will take for the most part the election of 1868, the time of the last Presidential election, and therefore most likely to bring out a full vote. In the Senate of New York seventeen Republican Senators had been elected the year before by 324,687 votes, and fifteen Democratic Senators by 353,136 votes. In the Assembly seventy-six Republican members were elected in 1868 by 397,899 votes, while only fifty-two Democratic members were elected by 431,510 votes. There were thus 28,449 more votes cast for the fifteen Democrats in the Senate than were cast for the seventeen Republicans, and, if the representation had been faithful to the principle, there would have been seventeen Democrats and fifteen Republicans, and the majority of two for the lat-

ter would have been reversed and made two for the former. There were at the next year's election 33,611 more votes cast for the fifty-two Democratic members of Assembly than for the seventy-six Republican members. If the representation here had been proportional to the votes, the number of Democrats elected would have been sixty-seven instead of fifty-two, the number of Republicans sixty-one instead of seventy-six; and the majority, instead of being twenty-four for the Republicans, would have been six for the Democrats.

Turning to other States we find the following results: in Maryland the Democrats cast 62,357 votes, and elected every member of both Houses, 111 in number; while the Republicans polled 30,438 votes, and elected nobody. In Delaware the Republicans elected only two members by 7,623 votes, while the Democrats elected twenty-eight by 10,980. In Kansas the Republicans elected one hundred and eight members by 31,046 votes, while the Democrats elected only seven by 14,019 votes. In Nevada the Republicans cast 6,480 votes, and elected fifty-one members; the Democrats cast 5,218, and elected only six members. In California the Republicans elected twenty-three members by 54,592 votes, while the Democrats elected ninety-seven members by a less number, that is, by 54,078. In Vermont two hundred and forty Republicans were elected by 44,167 votes, and twenty-six Democrats by 12,045. In Maine 70,426 Republicans elected two hundred and forty-three members, and 42,396 Democrats only thirty-seven. Maryland's Republicans thus cast nearly a third of all the votes in the State, without getting a single representative in either branch of the Legislature. In Delaware the Republicans gave over forty per cent. of the popular vote, and gained but six per cent. of the Legislature, while in California they gave an actual majority, but gained less than one fifth. On the other hand, the Democrats in Kansas gave a third of the votes, and obtained but six per cent. of the Legislature; in Vermont they cast twenty-one per cent. of the vote, and obtained but nine per cent. of the Legislature; in Maine they cast thirty-seven per cent. of the vote, and obtained only thirteen per cent. of the Legislature; in Nevada, with nearly half the vote, they had but ten per cent. of the Legislature.



Passing now to the Federal Government, we find that the representation in the House of Representatives for the State of New York consists of seventeen Republicans and fourteen Democrats, though the former received but 416,492 votes, while the latter received 423,365; that is to say, the popular majority was 7,073 for the Democrats, while the Congressional majority in the delegation is three on the side of the Republicans instead of being, as it should have been, one on the side of the Democrats. Taking the whole House of Representatives without the unrepresented States, we find one hundred and forty-eight Republicans and seventy-one Democratic members; the former having received 2,654,048 votes and the latter 2,037,178; that is to say, the Republicans on fifty-six per cent. of the popular vote have sixty-seven per cent. of the Congressional vote; and the Democrats on forty-three per cent. of the former have thirty-two per cent. of the latter.

In the Senate the representation is still further removed from the people, as the following statement will show :

There are thirty-seven States entitled to seventy-four Senators.

This table gives the vote of the eighteen States having the largest population and entitled to be represented in the Senate by thirty-six Senators :

New York, 849,750; Pennsylvania, 655,662; Ohio, 518,828; Illinois, 449,436; Indiana, 343,532; Michigan, 225,619; Virginia, 220,739; Massachusetts, 195,911; Iowa, 194,439; Wisconsin, 193,584; North Carolina, 176,324; New Jersey, 162,645; Georgia, 158,926; Kentucky, 155,455; Alabama, 147,781; Missouri, 147,135; Mississippi, 114,283; Maine, 112,822. Total vote, 5,022,871.

The following table shows the vote of the nineteen States having the smallest population and entitled to be represented in the Senate by thirty-eight Senators :

California, 108,660; South Carolina, 108,135; Texas, 107,780; Connecticut, 98,947; Maryland, 92,795; Tennessee, 82,757; Minnesota, 71,620; Louisiana, 71,100; New Hampshire, 69,415; Vermont, 56,224; West Virginia, 49,397; Kansas, 43,648; Arkansas, 42,148; Oregon, 22,085; Florida, 22,022;

Rhode Island, 19,541; Delaware, 18,575; Nebraska, 15,298; Nevada, 11,698. Total vote, 1,111,885.

Sixteen States, with thirty-two Senators, cast 787,310 votes. New York, with two Senators, cast 849,750. Twenty-six States, with fifty-two Senators, cast 1,948,189; three States, with six Senators, cast 2,024,240.

The city of New York casts more votes than the six States of Oregon, Florida, Rhode Island, Delaware, Nebraska, and Nevada.

Before passing from the subject of representation in the Federal Government, let us pause a moment to consider how far the Presidential electoral colleges represent the people. At the election of 1868, two hundred and fourteen Republican presidential electors were themselves elected by 3,013,188 votes, while the eighty Democratic electors received 2,703,600 votes from the people; that is to say, the Republicans on fifty-two per cent. of the popular vote obtained seventy-two per cent. of the electoral vote; while the Democrats on forty-seven per cent. of the popular vote obtained only twenty-seven per cent. of the electoral.

These statements serve to show that our practice and our theory are irreconcilable. We must accept one of two conclusions; either the practice or the theory is wrong. According to the latter the State governments are republican and representative in respect to persons; the General Government is federal, national, and representative in respect to both persons and corporations—the States. There was a time when representation in some of the States was largely corporate. That was so in Massachusetts. It is easy to see how corporate representation began. In England the municipalities were summoned by their representatives to Parliament for the purpose chiefly of granting aids to the Crown. In New England the town took the place of the municipality. It was counted as the unit in the composition of the Legislature. The representation there was of the towns as corporations, and the majority in each not only ruled in town affairs, but sent a representative to speak for the town in the General Court, or council of towns. But they have changed the theory and the practice. Corporate representation is nearly gone even there,

and in most of the States there is not a trace of it. As a general rule, the person is now taken as the unit, for the arrangement of representation in all the States. The Federal Government meantime depends upon the representation of the States in the Senate, and of persons in the House of Representatives. But so faulty are the contrivances for carrying out either theory, that neither in the Federal nor in the State government is there a representation faithful to the principle on which it rests. Where the representation is intended to be personal, it so happens that some persons only, and not all, are represented. And when the representation is intended to be corporate, that is, in the Federal Senate, the State may fail of representation, because the Senators are chosen by the Legislature, which in its turn is, or may be, chosen by a minority of the people of the State.

Our practice thus contravenes the fundamental principle of republican government, which is that the majority must rule. This principle is essential to the idea of such a government. Where the power resides in all the citizens, the voice of the greater number must prevail, or the minority will rule. This principle, carried to its legitimate result, requires that every question shall be decided by the majority of those in whom resides the ultimate power. As all citizens are equal in rights, the consent of the larger number must necessarily overbear the consent of the smaller number. This, however, is applicable only to the whole governing body; for, when you apply it to a body or number less than the whole, you may create a government of minorities. That is to say, when the city of New York is exercising the functions of local self-government, the voices of a majority of her citizens should prevail upon every question; but when she comes to participate in the government of the State, and for that purpose elects representatives to the State Legislature who are to vote upon State questions, if the electoral machinery is such as to express only the choice of a majority of the city's voters, the minority is lost. In other words, all the persons concerned in a question and having the right to decide it should be heard in person or by representation. Therefore, when the question is local, the local majority should govern; but, when the question is gen-

eral, it should be decided by the general majority, and not by local majorities, or a combination of local majorities, which may come to be in effect the same as a general minority.

This can be made plain by the example of a private partnership. Suppose it to consist of twenty-five partners. In a conflict of opinion, thirteen may rightfully control twelve; but, if it were arranged, at the beginning of the year, that the partners should be divided into five sections, and each select one of a managing committee of five, by which the whole business of the year should be conducted, who does not see that each one of the managing committee might be chosen by three of the five partners in the section, and that thus the whole five of the committee would be really the representatives of fifteen partners, and a majority of the committee, that is, three out of five, might in fact represent only nine of the twenty-five partners? Would anything come of such an arrangement but discontent and dissension before the end of the year? What would happen in a private partnership, upon so faulty a scheme of management, does happen, and must inevitably happen, in the State where a like faulty system of government is maintained. We think a careful examination of the irregularities and excesses of our politics will show that most of them have come from our disproportionate representation. The government of a republican country must represent the people, or the people will be dissatisfied. Those who have no voice in legislation, whose opinions are not heard or heeded, will be restive under authority. And it is not the minority only which suffers; the majority suffers also from having no proper or sufficient check, and, when at last the scale turns, the revulsion is violent and dangerous. If the antislavery minority could have been heard by its representatives from the beginning, increasing in numbers as the minority increased, not only they, but the proslavery majority would have been benefited; and who knows but the emancipation of the slaves might have been procured through peaceful legislation, at a cost in treasure, to say nothing of the cost in blood, of less than half the expenditure of the war? With how much less friction would the machinery of government move, if all the parts were carefully adjusted!

Thus far we have looked at the matter in a party light; but that by no means gives us all there is of it. The statutes which proceed from our legislative chambers are often the acts, not of parties or of party majorities, but of schemers and traffickers in legislation, to whom our present system gives scope. Of the 1,801 statutes passed by the Legislature of New York in the last two years, not a hundred were general, and of these scarce a tenth were passed upon party grounds. We have thus not only a misrepresentation of parties, with its tremendous consequences, but a representation of private interests struggling for private legislation, and converting our legislative halls into scenes of jobbery and intrigue. Under the false pretenses of party, the elector is cheated or seduced into voting for one of two men, neither of whom he likes or would trust in the management of his private affairs. He is reduced to a choice of evils, and he makes it under the pressure of party discipline. We all know that it is the custom for two conventions, supposing, as is generally the case, the division of the electors into two parties, to select each a candidate, and for the voter to choose between the two, or lose his vote altogether. This is the system in its best estate, which supposes the primary meetings to contain only the voters of the party, and the delegates to be fairly chosen, and these in their turn to discharge fairly their own duties of nominating candidates. Such is doubtless the fact in some districts of New York, and in some or perhaps all of Massachusetts.

But since there is no legal or adequate provision for the regulation of primary assemblies or nominating conventions, they are in other districts carried by fraud or violence, so that it may be said of not a few, that the scheme there established is for two bodies of incompetent or ill-intentioned men to put up each a man, and for the rest of the community to take their choice between these two. A system so vicious can beget nothing but vice. The man who thus obtains a seat in a legislative chamber repays the fraudulent instruments of his elevation by defrauding for them, and represents not even the voters whose enforced ballots were cast in his favor, but knots or rings of speculators, office-seekers, and plunderers. It is time to look these evils in the face. The frauds of elections—the

illegal voting and the false counting—have grown to be a scandal and a curse. But even these are less than the scandal and curse of legislative corruption. To betray any trust is disgraceful; to betray a public trust is both a disgrace and a crime. No just man, no man of honor, none indeed but a wretch, forsaken of God and accursed of men, can falsify his convictions and give his vote for money or personal advantage. He to whom a father intrusts his daughter for protection, and who abuses his trust by corrupting her, is accounted a monster of depravity; but his crime is less than that of the legislator, who, intrusted by his constituents with the great function of representing them in the making of laws, abuses that trust by selling, or bartering, or giving away his vote. And yet the miscreants who do this walk the streets, hold up their heads, look honest men in the face, and even get themselves returned from year to year. How does this happen? The majority does not approve their conduct; it must be a small minority which does. How, then, do they manage to gain and regain their seats? They do it not by the free, unbiased choice of the electors, but by the contrivances and tricks of our present system of local or district elections with their machinery of partisan nominating conventions. Good men have long bewailed these evils, but have failed to arrest them. We see no chance of doing so but through a better system of representation.

The choice of bad men is, however, not the only evil of the system. The good men who find their way into our Legislatures are crippled by it. Their influence is weakened and their independence menaced. When one of them opposes a favorite scheme of the party managers of his district, he is sure to receive a warning as well as a remonstrance. Thus the representative and the constituent are both demoralized.

These evils do not spring from a corrupt community. The majority of the people are not debauched. The fault lies in a vicious electoral system, which produces a representation neither of parties nor of the general public, which constrains the majority, and stifles the voices of large portions of the people.

The importance of representation, or rather the evil of non-representation, is measured by the value of popular govern-

ment. By leaving large numbers of citizens without voice in the State, we not only lose the benefit of their counsel and coöperation, but we make them discontented. The fraud and falsehood of the system beget other frauds and falsehoods, and lower the moral tone of the whole community. The vast power and patronage of government often depend upon a few votes. Need we wonder that force and fraud should both be used to procure them? Parties are themselves deceived by their preponderance in Legislatures, without considering how far it rests upon a like preponderance out-of-doors. The opinions and wishes of large portions of the people are disregarded. They see measures of great significance adopted which they disapprove, but are powerless to prevent, while they are unable to procure a consideration of others which they think indispensable to the general good. If we can devise a remedy, if we can by any means procure an electoral system, by which the wishes of the whole people will be made known, and the votes of their real representatives taken, on all measures of legislation, we shall have saved the State from the danger which seems now to be impending over it.

Various plans have been proposed, of which we will now proceed to give an account. The problem is, how to procure a legislative body, which at the time of its election will faithfully represent the whole body of electors. The point to be gained is the giving to every elector a representative, so that, when the Legislature meets, the former may feel that he can point to some one on the floor to whom he has given authority to speak and act for him, and that the latter may represent only the voters who have given him their suffrages.

In this country, as we have said already, the basis of representation is generally population, except in the Federal Senate; that is to say, the representatives are apportioned among the people in the ratio of their numbers. In the Federal House of Representatives the ratio must be determined by population, instead of electors, because the States differ in the distribution of the suffrage, some admitting more persons and some less to the privilege of voting. In the States the representatives may be apportioned among the electors as easily as among the population. It does not matter, however, so far as the principle is

concerned, whether we take the quota of population or of electors, since in either case we adhere to the quota. In this respect, the remedy we are seeking is more easily applied here than it can be in England, where corporate representation so largely obtains. The peculiarity of our system is, that when the quota is ascertained we assign it to given territorial limits, the effect of which is to disfranchise the minorities in the districts, whether the districts be single or plural, since we require each vote to be cast for all the representatives to be elected from the district, be they several or one. What we have to do is, to divorce the quota from the district, either by dispensing with the districts altogether, or by enlarging the districts to the limits of several quotas, and allowing the ballots to be divided, making the number equal to the quota sufficient in all cases to elect a representative.

Speculations on the subject were begun as early as the latter part of the last century. A bill for English Parliamentary reform, introduced by the Duke of Richmond in the year 1780, contained a clause looking to a representation of local minorities. In the former part of the present century a scheme having the same object was broached by the late Mr. Hill. In 1855 a plan, proposed by M. Androe, was introduced into the representative system of Denmark. In 1859 Mr. Hare published his great work on the election of representatives parliamentary and municipal. Since then the subject has received much attention and given rise to many discussions in this country, and in England, France, Switzerland, Germany, Belgium, Sweden, and Australia.

Mr. Hare's scheme is one which, for the sake of distinction, may be called that of *preferential* voting. It ascertains the quota by dividing the whole number of voters by the whole number of representatives. Thus, if the number of voters should be 800,000, and the number of representatives to be chosen 200, the quota of voters to each representative would be 4,000. Then the voter is to deposit at the polls a voting paper, on which he shall have placed, in the order of his preference, the names of the candidates, or of so many of them as he pleases. No vote is to be counted for more than one candidate; any candidate receiving 4,000 votes is to be declared



elected; if the candidate first on a voting paper fails to obtain the quota, or has already obtained it, the vote descends to the next in order of preference; when a candidate has obtained the quota, his votes up to that number are to be laid aside, and the remaining votes are to be counted for the candidate next in the order of preference, and so on till all the votes are appropriated, and the whole number of representatives is obtained. If there be not 200 persons credited each with 4,000 votes, and the representative body is consequently deficient in number, the deficiency is to be made up by taking the candidates who come nearest to the required quota. This method, which we have called that of preferential voting, is also called by the Swiss reformers that of the electoral quotient (*le quotient electoral*).

A *second* plan is that of *cumulative* voting. The theory of this is, that, a quota being ascertained as before, each voter shall have as many votes as there are representatives to be elected (either from the whole State, or from electoral districts less than the State, as may be determined), and shall be at liberty to cast them all for one candidate, or divide them among several, as he pleases. This plan has been proposed in Congress by Mr. Buckalew, of Pennsylvania, and in the Illinois State Convention by Mr. Medill and others. Its operation may be illustrated thus: Massachusetts has ten representatives in the Lower House of Congress; each voter has ten votes; he may give them to ten candidates, one to each, or he may cumulate them upon a less number than ten, even upon one. One tenth of the voters may so be sure of a representative, if they choose to unite upon one person. Thus, suppose the number of voters to be 200,000, and each with ten votes, making 2,000,000 votes in all, of which 200,000 shall be sufficient to elect. The friends of any one candidate might secure the concentration or cumulation of the 200,000 votes, cast by 20,000 voters, and these would have a representative, though all the remaining votes were cast for one person. In practice, no doubt, tickets would be made up by the two parties, and each party would send representatives nearly proportionate to its constituency.

A *third* plan is that of *limited* voting; by which is to be

understood that of requiring the votes to be cast for a less number of candidates than the whole. Thus, if the number of voters were 100,000 and the number of candidates to be elected from the State or district ten, and each voter were allowed to give only one vote for one candidate, the result would be that every 10,000 persons might have a representative, if they would. This plan is generally mentioned in connection with several candidates, sometimes in connection with single ones.

For example: in what are called the three-cornered districts of England, that is, the districts which send three members to Parliament, it has been provided that each voter shall vote only for two candidates. And in the late amendment to the Constitution of New York it is provided, in respect to the first election of seven Judges of the Court of Appeals, which election is by general ticket for the whole State, that each ticket shall contain the names of only five candidates. Of course, there will be two tickets, each nominated by a party convention; but the minority party will certainly elect two of the Judges.

The *fourth* plan is that of *substitute* voting; which permits candidates to cast anew the useless votes given to them, and substitute a third person in their place. A plan of this sort has been recommended by Mr. Fisher, of Philadelphia. Thus, supposing again the number of electors to be 100,000 and of representatives ten, and 10,000 votes to be sufficient for election, and then supposing six candidates to have received each 15,000, that is, 90,000 in all, and two others each 5,000. Here are 30,000 surplus votes, cast for the elected candidates, and 10,000 insufficient votes, divided between two persons, so as to give neither of them enough to elect him: the plan we are speaking of allows the three elected candidates to cast the 30,000 surplus votes, and the two defeated candidates to cast the 10,000 insufficient votes, for new candidates. These eight persons would then substitute four other persons as the candidates to receive the 40,000 votes, and would elect them, to serve with the six first elected.

The *fifth* plan is sometimes called that of *proxy*-voting; which permits every voter to give his vote or proxy to any

person he pleases, and that person to represent him in the representative chamber if he can unite upon himself other proxies sufficient to make up the electoral quota, and, if he receives more than this sufficient number, then to cast additional votes in the chamber, proportionate to the number of proxies received. This is the plan put forth three years ago by the Personal Representation Society of New York.

The *sixth* plan is that of *list-voting*, or what is called the free concurrence of lists, or the open list, a plan recommended by M. Naville, of Geneva, as second in merit only to the plan of preferential voting. It supposes lists of candidates containing each the names of as many as there are representatives to be chosen, ranged in the order of preference, to be deposited with the proper authorities a certain time before the election, and numbered. Each elector gives his vote for a particular list. The whole number of votes for that list is divided by the electoral quotient, and the result gives the number of candidates chosen on that list. For example: if there be fifteen representatives to be elected, 15,000 voters, and five lists of candidates, list A, receiving 5,000 votes, secures five representatives; list B, receiving 4,000 votes, secures four representatives; list C, receiving 3,000 votes, secures three representatives; list D, receiving 2,000 votes, secures two representatives; list E, receiving 1,000 votes, secures one representative. In case of a vacancy caused by death or resignation, election on more than one list, or other cause, the place is to be supplied by the candidate next in order.

This plan would operate thus, in a State having 100,000 voters and ten representatives in Congress to choose, and three parties with each a list, list A receiving 60,000 votes; list B receiving 30,000 votes; list C receiving 10,000 votes: The quota, or electoral quotient, being 10,000, list A would be entitled to six representatives, list B to three, and list C to one. The six highest names on list A, the three highest on list B, and the one highest on list C, would then be chosen as the representatives of the State in Congress.

We have given these different plans, in general terms, with very little detail; but sufficient, we think, to show the principle on which each of them rests. They are not always pre-

sented in the form in which we have given them. Modifications, greater or less, have been suggested. But we think we have given the substance of all the plans which have been proposed for the amendment of the electoral system. All of them are large reforms ; but they are not alike in merit. That of preferential voting is theoretically the most perfect, and if faithfully executed would give the best representative chamber. It would compel a certain degree of deliberation before voting ; would insure to two or more parties proportional representation in the Legislature, and would insure a certain degree of non-partisan representation. Whether it would prove, as has been predicted, too complicated in its working among a large constituency, can hardly be determined before actual experiment. We should fear that under it there would be opportunity for much fraudulent counting, and, while it would give to each party its proper weight in legislation, it would leave much in the power of party managers. The proxy system would give the most complete representation. The objections to it are that there would be a loss of the deficient votes ; that is to say, the votes given for a candidate who could not concentrate upon himself sufficient to make a quota would be thrown away, unless a transfer to other candidates were permitted. Preferential voting avoids both the objection of too great concentration of votes upon one person and the loss of votes below the quota, since no candidate can have counted in his favor more than enough to elect him, and every vote will be counted, except the number less than a quota left after electing all of the required number of candidates. Other difficulties, however, might appear in the actual working of any of the plans which we do not now foresee.

Indeed, though we are confident that any one of them would go far to purify our elections and our legislation, we think the preference among them can only be decided by actual experiment. Some of them may be best in a large constituency, and others in a small one.

If we might choose which to begin with, and where to begin, we would try the plan of cumulative voting for members of Congress in the State of Massachusetts, and that of limited voting for aldermen in the city of New York, restricting in

the latter case each voter to one candidate. The former might require concurrent legislation of Congress and of the General Court; the latter only an act of the New York Legislature. In either case, the process would be simple enough. To begin with the Congressional election in Massachusetts, which sends ten members to the House of Representatives, and has about 200,000 voters: Every voter would give ten votes, which he might scatter among ten candidates, or cumulate them upon a less number, even upon one. The whole number of votes to be counted would be 2,000,000. Parties are divided between the Republicans and Democrats in nearly the proportion of two thirds to the former and one third to the latter, giving the Republicans about 134,000 voters and the Democrats about 66,000, though the latter have not a single member of Congress. Each party would calculate its strength beforehand, and nominate as many candidates as it was confident of electing. If the Republicans were to nominate a full ticket of ten candidates, they could give each only 134,000 votes; while the Democrats, if they nominated four candidates, could give each of them 165,000 votes. The result would be that the Republicans would nominate only seven or eight candidates, and the Democrats three or four. There would also be an opportunity for any number of voters wherever obtained throughout the State, not less than 20,000 in all, to elect their own candidate, without regard to either party. If by any chance, a most improbable one, the votes should be cumulated upon a less number of candidates than ten, a new election would have to be ordered to supply the deficiency.

Then in regard to the trial of limited voting for aldermen in the city of New York, the process should be this: supposing fifteen aldermen to be elected by general ticket, which is the scheme of the new charter just enacted by our Legislature, each voter should be limited to one candidate, and each ballot should have only one name upon it. There being about 150,000 voters in the city, every 10,000 of them, wherever residing and of whatever party, might have a representative in the chamber of aldermen. If there should happen to be a large concentration of votes upon one person, that would not be a very great evil, since it could scarcely happen that there would not be

candidates sufficient to fill the board. If that very improbable event should come to pass, a new election would supply the deficiency. In practice, parties would probably distribute their tickets about the city in such manner as not to waste their votes.

That these changes would be great improvements upon our present system, we venture to think we have already shown. If irregularities or difficulties should appear in the practical working—and such are likely to occur in the introduction of any new scheme—they can be remedied afterward, as occasion offers. When once the theory of proportional representation is reduced to practice, and made familiar to the people, it will assert its superiority. If one of the methods of practical application is found imperfect, it will give way to another and better. All the plans which have been explained are kindred in general theory and in purpose. Any of them would give to a minority party a representation proportional to its numbers; and most of them would give to electors who are not partisans an opportunity of being heard and felt in representative halls. The elector would be independent of party in his choice of a candidate; and the person elected without a party nomination would be beyond the domination of nominating conventions or party managers. Even these would be put upon their good behavior, by the knowledge that their favor was not essential to the success of any person; and their candidates, being placed in competition with men independently nominated, would have to be selected with more attention to their fitness. Any person who has the confidence of a quota of electors could be elected to represent them, whatever party, or partisan tool or master, might say. No bully of the primaries, no tempter of the lobby, no hound of party, would have dominion over him.

We boast that a popular representative republican government is the best in the world. It has been already shown how far in practice we fall behind our theory. To this cause are due in no small degree the corruptions, gross and monstrous, which oppress us. We have saved the life of the nation in its struggle with slavery and rebellion. We have now to save it from another enemy more subtle and not less formidable, official and electoral corruption. There is no time to be lost. Let us begin at once.

## THE ELECTORAL VOTES OF 1876.

*WHO SHOULD COUNT THEM, WHAT SHOULD BE COUNTED,  
AND THE REMEDY FOR A WRONG COUNT.*

Pamphlet by Mr. Field, published in January, 1877.

THE electoral votes of 1876 have been cast. The certificates are now in Washington, or on their way thither, to be kept by the President of the Senate until their seals are broken in February. The certificates and the votes of thirty-four of the States are undisputed. The remaining four are debatable, and questions respecting them have arisen, upon the decision of which depends the election of the incoming President. These questions are: Who are to count the votes; what votes are to be counted; and what is the remedy for a wrong count? I hope not to be charged with presumption if, in fulfilling my duty as a citizen, I do what I can toward the answering of these questions aright; and, though I happen to contribute nothing toward satisfactory answers, I shall be excused for making the effort.

The questions themselves have no relation to the relative merits of the two candidates. Like other voters, I expressed my own preference on the morning of the election. That duty is discharged; another duty supervenes, which is, to take care that my vote is counted and allowed its due place in the summary of the votes. Otherwise, the voting performance becomes ridiculous, and the voter deserves to be laughed at for his pains. His duty—to cast his vote according to his conscience—was clear; it is no less his duty to make the vote felt, along with other like votes, according to the laws.

The whole duty of a citizen is not ended when his vote is delivered; there remains the obligation to watch it until it is duly weighed, in adjusting the preponderance of the general choice. Whatever may be the ultimate result of the count, whether his candidate will have lost or won, is of no impor-

tance compared with the maintenance of justice and the supremacy of law over the preferences and passions of men.

It concerns the honor of the nation that fraud shall not prevail or have a chance of prevailing. If a fraudulent count is possible, it is of little consequence how my vote or the votes of others be cast; for the supreme will is not that of the honest voter, but of the dishonest counter; and, when fraud succeeds, or is commonly thought to have succeeded, the public conscience, shocked at first, becomes weakened by acquiescence; and vice, found to be profitable, soon comes to be triumphant. It is of immeasurable importance, therefore, that we should not only compose the differences that, unfortunately, have arisen, but compose them upon a basis right in itself and appearing to be right also.

#### WHO SHOULD COUNT THE VOTES?

This is the first question. What is meant by counting? In one sense, it is only enumeration, an arithmetical operation, which in the present instance consists of addition and subtraction. In another sense, it involves segregation, separation of the false from the true. If a hundred coins are thrown upon a banker's counter, and his clerk is told to count the good ones, he has both to select and to enumerate. He takes such as he finds sufficient in metal and weight, and rejects the light and counterfeit. So when the Constitution ordains that "the votes shall then be counted," it means that the true ones shall be counted, which involves the separation of the true from the false, if there be present both false and true. In regard to the agency by which this double process is to be performed, the words of the Constitution are few: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." What would one take to be the meaning of these words, reading them for the first time? It is, that somebody besides the President of the Senate is to count, because, if he was to be the counting officer, the language would naturally have been that *the President of the Senate shall open all the certificates and count the votes*. There must have been a reason for this change of phraseology. It should seem to follow,



from these words alone, that, whoever is to count, it is not the President of the Senate. It should seem also to follow that the counting is to be done, not in the presence of Senators and Representatives as individuals, but in the presence of the two Houses as organized bodies. If their attendance as spectators merely was intended, the expression would naturally have been, in the presence of the Senators and Representatives or so many of them as may choose to attend. The presence of the Senate and House means their presence as the two Houses of Congress, with a quorum of each, in the plenitude of their power, as the coördinate branches of the legislative department of the Government. And, inasmuch as no authorities are required to be present other than the President of the Senate and the two Houses, if the former is not to count the votes, the two Houses must.

The meaning which is thus supposed to be the natural one has been sanctioned by the legislative and executive departments of the Government, and established by a usage, virtually unbroken, from the foundation of the Government to the present year.

The exhaustive publication on the Presidential counts, just made by the Messrs. Appleton, leaves little to be said on this head.

The sole exception suggested, in respect to the usage, is the resolution of 1789, but that is not really an exception. We have not the text of the resolution. We know, however, that there was nothing to be done but adding a few figures. There was no dispute about a single vote, as all the world knew. But, taking the resolution to have been what the references to it in the proceedings of the two Houses would imply, it meant only that a President should be chosen for that occasion only. The purpose was, not to define the functions of any officer or body, but to go through the *ceremony* of announcing what was already known, and to set the Government going. No decisions between existing parties were to be made; no selection of true votes from false votes, but only an addition of numbers. Individual members of Congress have undoubtedly in a few instances expressed different views, but these members have been few, and they have always been in a hopeless mi-

nority. If any one can read the debates, the bills passed at different times through one House or the other, the joint resolutions adopted, and the accounts of the votes from time to time received or rejected, and doubt that the two Houses of Congress have asserted and maintained, from 1793 until now, their right to accept or reject the votes of States, and of individual electors of States, all that I can say is, that he must have a marvelous capacity of doubting. He must ignore uniform practice as an exponent of constitutions, and set up his individual misreading of words, reasonably plain in themselves, against the opinions of almost all who have gone before him.

The joint resolution of 1865 is of itself decisive, if a solemn determination of the two Houses of Congress, approved by the President, can decide anything. That resolution was in these words:

*"Whereas, The inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee, rebelled against the Government of the United States, and were in such condition on the 8th day of November, 1864, that no valid election of electors for President and Vice-President of the United States, according to the Constitution and laws thereof, was held therein on said day: therefore—*

*"Be it resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, That the States mentioned in the preamble to this joint resolution are not entitled to representation in the electoral college for the choice of President and Vice-President of the United States for the term commencing on the 4th day of March, 1864, and no electoral votes shall be received or counted from said States, concerning the choice of President and Vice-President for said term of office."*

In approving this resolution, President Lincoln accompanied it with the following message, parts of which I will italicize:

*"To the Honorable the Senate and House of Representatives:*

*"The joint resolution, entitled 'joint resolution declaring certain States not entitled to representation in the electoral college,' has been signed by the Executive, in deference to the view of Congress implied in its passage and presentation to him. In his own view, however, the two Houses of Congress, convened under the twelfth article of the Constitution, have complete power to exclude from counting all electoral votes deemed by them to be illegal, and it is not competent for the Executive to defeat or obstruct that power by a veto, as would be the case if his action were at all essen-*

tial in the matter. He disclaims all right of the Executive to interfere in any way in the canvassing or counting electoral votes, and also disclaims that by signing said resolution he has expressed any opinion on the recitals of the preamble, or any judgment of his own upon the subject of the resolution."

If this resolution of the two Houses was authorized by the Constitution, there is no ground for maintaining the power of the President of the Senate to decide the question of receiving or rejecting votes. For, if he has the power under the Constitution, he can not waive it, nor can any action of Congress take it away. The resolution of 1865 had the sanction of each House, was signed by the President of the Senate and the Speaker of the House, and was approved by the President. It should set the question of the power of the two Houses for ever at rest.

The joint rule, first adopted in 1865, and continued in force for ten years, asserted the same control. It should not have been adopted if the pretensions now set up for the President of the Senate were of force; and he might at any time have disregarded it as worthless. But he did not disregard it—he did not question it; he obeyed it.

The action of the present Houses, moreover, is an affirmation of their right to eliminate the false votes from the true. Else why these committees of each House, investigating at Washington and in the North and South? Are all the labor and expense of these examinations undertaken solely in order that the results may be laid before the President of the Senate for *his* supreme judgment in the premises? It is safe to say that there is not a single member of either House who would not laugh you in the face for asking seriously the question.

Assuming, then, that the power to decide what votes shall be counted belongs to the two Houses, how must they exercise it? Here, again, let me take the illustration with which I began, of the coins upon a banker's counter. Let us suppose that, instead of one clerk, two were told to count them together. When they came to a particular coin upon which they disagreed, one insisting that it was genuine and the other that it was counterfeit, what would then happen, if they did

their duty? They would count the rest and lay that aside, reporting the disagreement to their superior. The two Houses of Congress have, however, no superior, except the States and the people. To these there can be no reference on the instant; and the action of the two Houses must be final for the occasion.

There can be no decision of the Houses if they disagree, and, as no other authority can decide, there can be no decision at all. The counting, including the selection, is an affirmative act; and, as two are to perform it, if performed at all, no count or selection can be made when the two do not concur. Two judges on the bench can not render a judgment when there is a disagreement between them. No more can the two Houses of Congress. There is here no pretense of alternative power, playing back and forth between the President of the Senate and the two Houses. If the former has not power complete and exclusive, he has none. The result must be that, what the two Houses do not agree to count, can not be counted.

#### WHAT VOTES SHOULD BE COUNTED.

This is the second question. The votes to be counted are the votes of the electors. But who are the electors? The persons appointed by the States, in the manner directed by their Legislatures respectively. How is the fact of appointment to be proved? These are the subordinate questions, the answers to which go to make up the answer to the main question.

What are the means of separating the genuine from the counterfeit? Where are the tests by which to distinguish the true votes from the false?

The words of the Constitution are not many: "Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors," who shall meet and vote, "make distinct lists of all persons voted for as President, . . . and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate."

*The State* must appoint, and the appointment must be

made *in such manner as the Legislature* thereof may direct. Here are the two elements of a valid appointment, and they must concur. An appointment not made by the State, or not made in the manner directed by its Legislature, is no appointment at all.

There must be *State* action in the *manner* directed. If, for example, an appointment were made by a State authority, such as the Governor, without the sanction of the Legislature, it would be void. If it were made by the people in mass-convention, but not in a manner directed by the Legislature, it would be void also. And if, on the other hand, it were made in such manner as the Legislature had directed, but not made by the State, it would be equally invalid. Indeed, the Legislature may itself have given a direction in contravention of the State Constitution, and thus the direction prove a nullity. So, too, the Legislature may have acted in contravention of the Federal Constitution, and for that reason its direction may have been void. The appointing power is the State, the manner of its action is prescribed by the Legislature; the valid authority and the valid manner of its exercise must concur, to make a valid appointment.

If, therefore, the persons assuming the office are not appointed *by the State*, and *in the manner* directed by the Legislature, they are not electors; that is to say, they are not electors *de jure*; electors *de facto* they can hardly become, since their functions exist but for a moment, and with one act they perish. What is an appointment by the State? How can a *State* appoint? I answer, by the people, the corporators of the body politic and corporate, or by one of the departments of its government, as established by its Constitution. The power to appoint can not be renounced or divested. It must ever remain in the State, a living power, to be called into action at each recurring election. It can not be delegated, except as the different powers of the State are by its Constitution delegated to its great departments of government. If it were otherwise, it might be delegated to a foreign prince, and delegated in perpetuity. It is no answer to say that such a delegation *would* not be made; the question is, whether it *could* be made, without violating the Constitution of the country?

I insist that it could not; and that, if the Legislature of New York were to authorize our friend the Emperor Alexander, or our excellent neighbor the Governor-General of Canada, to appoint the thirty-five Presidential electors to which New York is entitled in the sum total of the electoral colleges, and the electors thus appointed were to receive the certificate of the Governor of New York, and to meet, vote, and transmit their certificates to Washington, the votes might be lawfully rejected. Such an occurrence is in the highest degree improbable; but stranger things than that have happened. The Empress Catharine intervened in the election of the kings of Poland, and the interference led to the downfall of the government and the blotting of the country from the map of Europe. Indeed, I venture to express my belief that such an intervention of foreign influence in our elections would have been hardly more startling to the imaginations of our fathers than the spectacle which our own eyes have seen: Federal soldiers removing representatives from the Capitol of one State, and stationed at the doors of another, to inspect the certificates of members elected to its Legislature.

Not to go abroad, however, for illustrations, let us suppose that the General Court convened in the State-House at Boston were to depute the State of New York or the State of Virginia to appoint electors for the State of Massachusetts, no man would be wild enough to pronounce such a deputation valid. It should seem to be certain, for a reason hardly less satisfactory, that the Legislature of Massachusetts could not authorize the Mayor of Boston or the Town Council of Worcester to appoint her electors; and, if that be so, and the rule is to prevail that, in law, what can not be done directly can not be done indirectly, it should follow that the State could not delegate to any other agency the power of appointment. If a body called a returning board be so constituted as that, in certain contingencies, it may depart from the inquiry what votes have been cast, and cast the votes itself, or by *any sort of contrivance* do the same thing under a different name, or by a roundabout process, it is, to that extent, an unlawful body under the Federal Constitution. Assuming, then, that a returning board has among its functions that of rejecting the

votes in particular districts, for the reason either that they were affected by undue influence or that other voters were led by like influence to refrain from voting, can such a function be valid under the Constitution of the United States? There is no question here of throwing out particular votes for vices inherent in themselves, such as that they were illegible, or were cast by disqualified persons, and the like; but the question is of rejecting the votes of a certain number—say a thousand voters—either because they were unduly influenced, or because another thousand, who might have voted, were, by undue influences, prevented from voting at all.

Whatever may be the law of a State in respect to the choice of its own officers, it seems most reasonable to hold that, under that common Constitution which governs and provides for all the States alike, when the only legitimate inquiry is whom has a particular *State* appointed, in the manner directed by its Legislature, and the Legislature has directed the appointment to be made by a general election, that is, by the votes of all qualified persons, the only valid office of a returning board must be to ascertain and declare how the State has actually voted, not how it might or would have voted under other circumstances, or, in other words, what is the number of legal votes actually cast; not how many have been unduly influenced, or how many other votes would have been cast in a different state of affairs. I use the expression undue influence, as more comprehensive than riot, bribery, or intimidation, and including other forms of improper influence, such as that of capital over labor. The question should be put in a general form to be correctly answered, because there is nothing in intimidation by violence which would make it a good cause for exclusion, more than that other kind of intimidation, which is social or financial. If, in ascertaining the state of the vote, it be lawful to inquire whether certain voters were frightened by a rifle-club to stay away from the polls, or to vote as the club dictated, it must also be lawful to inquire whether the same number of voters were induced to vote or not to vote by fear that their discounts might be lessened at the village bank, or their employment discontinued at the neighboring factory. I state the proposition, therefore, as one covering all kinds

of undue influence. I refrain, however, from going into the question whether this influence was or was not exerted, for I am inquiring into the law as applicable to certain alleged facts, leaving the truth of the allegations to be dealt with by others.

The sole object of all the machinery of elections, the ballots, the ballot-boxes, the canvassers and supervisors of elections, the returns and the returning boards, is, to ascertain the will of the people. Nobody supposes that that will is ascertained to a certainty. An approximation only is possible under our present system. To say nothing of the exclusion of women from an expression of their will, a portion only—though it may be a large portion—of the men express theirs. The sick, the infirm, the absent, say nothing. The registration is always in excess of the actual vote, and the number of possible voters exceeds the registration. The reason is patent: many voters are absent at the time of registration, or are otherwise unable or unmindful to register; and when the time of voting arrives many of those who are registered are absent or prevented from attendance. The registration may generally be had on any one of several days, while the voting is to be done on one day. The machinery is imperfect and clumsy at best; but that is not a reason for making it worse, or depriving ourselves of the advantages which it yields, notwithstanding its imperfections. The nearest approach to absolute justice that we can now hope to make is *to take the votes* of all the voters who offer themselves, and *count the votes that are taken*. Every scheme of counting out legal votes cast, or counting in votes not cast, must result in confusion, uncertainty, and fraud. No matter how specious the argument may be, it will always mislead, for the reason that it must in its nature substitute conjecture for fact. The vote must, of course, be legal, it must be intelligible; but such a vote when offered must be taken, and when taken counted.

The throwing out of all the votes of certain districts is but another mode of accomplishing the same result as would be effected by the rejection and addition of votes in the cases supposed: for, if there be 10,000 voters in the district, and 5,000 only vote, it can make no difference whether the 5,000 be re-



jected, or be allowed to remain and the same number be added to the other side.

If the Legislature of a State were to resolve beforehand that no votes should be taken in certain counties or parishes, should we not say that the vote of the remaining counties or parishes would not express the vote of the State? If, in a particular parish, with twenty polling-precincts, ten of the precincts are so disturbed by violence that no votes can be taken, and in the other ten there is no violence, should the votes of the latter be taken as the net result, or should no result be declared because half of the voters are prevented from voting? The practice of a State must be consistent with itself. When the votes of three fourths of a State are proffered as the vote of the State, the votes of three fourths of a parish must be received as the vote of the parish. If there was not a "fair and free election" in one fourth of the parishes, there was not a "fair and free election" in the State; and the just result should be that, instead of rejecting the votes of those parishes because a portion of the voters were intimidated, the votes of the *State* should be rejected altogether.

But why, let me ask, should lawful votes in any case be rejected, because other lawful votes might have been given? If they, whose votes were cast, had prevented other votes from being also cast, that might be a reason for punishing the former. But, if the former were blameless, where is the justice of punishing them for the faults of others? Suppose a parish with 10,000 persons entitled to vote, and divided into ten precincts. Ordinarily only 8,000 will register and 6,000 vote; the vote of the 6,000 being assumed to be an expression of the will of the 10,000. At a particular election 3,000 persons vote in five of the precincts. In the other five only 1,000 vote, there being disturbances on or before the day of election. It is alleged that the last 1,000 votes should not be counted. Why not? Because, say the objectors, 2,000 persons did not vote, and it is to be presumed, first, that they were kept from the polls by fear, and, next, that if they had voted at all, they would have outvoted the 1,000. Are not these the merest assumptions? You can not get the truth without knowing the motives which kept voters away, and how they would have voted if they had

come. You can not know either with certainty, without examining all the voters. And the theory which would lead you to call them for examination should also lead you to call all who in other cases have not voted, to ask why they kept away, and how they would have voted if they had been present. The argument which justifies the exclusion in case of intimidation would include all cases of absence and of inquiry into what would have been the result if there had been no absence. Intimidation is one kind of undue influence; expectation of benefit is another; fear of social ostracism is another: will you go into them? There seems no middle course between excluding all inquiry into the cause of absence and the probable votes of the absent, and allowing it in every instance where persons entitled to vote have not voted. To my thinking, a certificate given after the elimination of votes, in the manner indicated, certifying that the electors have been chosen by the people of the State, is a palpable falsehood. *It should have certified that they had been chosen by the people of so many parishes or counties, out of the whole number.*

It is impossible, without deranging our system of election, either to reject votes actually cast, out of consideration for the motives with which they were cast, or to add to them the supposed votes which might have been cast. The ballot itself is a standing protest against inquiry into motives. It enjoins and protects the secret of the hand; much more should it enjoin and protect the secret of the heart. And as for adding votes, on the supposition that they might or would have been cast but for untoward circumstances, no plausible reason can be given for it which would not apply to any case of disappointment in the fullness of the vote. A rainy day of election costs one of the parties thousands of ballots. If it happen to rain on that day, why not order a new election in better weather; or, to save that formality, make an estimate of the number who would have attended under a cloudless sky, and add their ballots to one side or the other? The rejection of the votes of a parish can be justified, if justifiable at all, only on the ground that the votes cast do not give the voice of the parish, either because they did not express the real wishes of

the voters, or because they would have been overborne by other votes if they could have been cast.

Does not the foregoing reasoning lead to this conclusion, that, whether the charges of intimidation in certain counties or parishes of a State be founded in fact or in error, they do not warrant the rejection of the votes actually cast in those counties or parishes; and, furthermore, that they who insist upon such rejection must accept, as a logical conclusion, the rejection, for a like reason, of the votes of the whole State? I submit that such are the inevitable conclusions.

It is insisted, however, that this is an inquiry which can not be gone into in the present state of the canvass. Certificates have been sent to Washington, purporting to give the result of the election. The question will probably arise, at the meeting of the two Houses, in this manner: Two certificates are required, one signed by the electors, pursuant to the Constitution, certifying their own votes; and the other signed by or under the direction of the Governor of the State, pursuant to act of Congress, certifying the appointment of the electors. Both certificates are sent to the President of the Senate, in one envelope. It may, indeed, happen that two envelopes come from the same State, each containing two certificates of rival Governors and rival electors. If there is but one envelope, one of the certificates which should be there may be omitted, or may be imperfect. In all these cases, it is manifestly incumbent upon the two Houses to receive or reject, in the exercise of their judgment. But if one envelope only is presented, containing the two certificates, both in due form, and objection is nevertheless made that the certificate of the appointment of electors is false, can the objection be entertained? There are those who affirm that it can not. They reason in this wise: The States are to appoint the electors, and may therefore certify such as they please. But is not that a *non sequitur*? The States may appoint whom they please, in such manner as their Legislatures have directed; but an appointment and a certificate are different things. The latter is, at the very best, only evidence of the former. The fact to be determined is the appointment: the certificate is produced as evidence; it may be controvertible or incontrovertible, as

the law may have provided, but there is nothing in the nature of a certificate which forbids inquiry into its verity; it is not a revelation from above; it is a paper made by men, fallible always, and sometimes dishonest as well as fallible; and, if honest, often misleading. It is made generally in secret and *ex parte*, without hearing both sides, without oral testimony, without cross-examination. Of such evidence it may be safely affirmed that it is never made final and conclusive without positive law to that express effect.

Now, it may be competent for the Legislature of a State, under its own Constitution, to determine how far one of its own records shall be conclusive between its own citizens. It may enact that the certificate of a Judge of a court of record, of a sheriff, a county commissioner, a board of tax-assessors, or a board of State canvassers, shall or shall not be open to investigation. There is, however, no act of Congress on the subject of the present inquiry, and we are left to the Constitution itself, with such guides to its true interpretation as are furnished by just analogy and by history. If it can be shown that the certificate was corruptly made, by the perpetration of gross frauds in tampering with the returns, must it nevertheless flaunt its falsehood in the faces of us all, without the possibility of contradiction? A President is to be declared elected for thirty-eight States and forty-two millions of people; the declaration depends upon the voice, we will suppose, of a single State; that voice is uttered by her votes; to learn what those votes are, we are referred to a certificate, and told that we can not go behind it. In such case, to assert that the remaining thirty-seven States are powerless to inquire into the getting up of this certificate, on the demand of those who offer to prove the fraud of the whole process, is to assert that we are the slaves of fraud, and can not take our necks from the yoke. I do not believe that such is the law of this land, and I give these reasons for my belief.

In the absence of express enactments to the contrary, any Judge may inquire into any fact necessary to his judgment. The point to be adjudged and declared in the present case is, Who has received a majority of the electoral votes? that is, of valid electoral votes; not, Who has received a majority of cer-

tificates? A President is to be elected, not by a preponderance of certification, but by a preponderance of voting. The certificate is not the fact to be proved, but evidence of the fact, and one kind of evidence may be overcome by other and stronger evidence, unless some positive law declares that the weaker shall prevail over the stronger, the false over the true. There may, as I have said, be cases where, for the quieting of titles, or the ending of controversies, a record or a certificate is made unanswerable—that is, though it might be truthfully answered, the law will not allow it to be answered. Such cases are exceptional, and the burden of establishing them rests upon him who propounds them. Let him, therefore, who asserts that the certificate of a returning board can not be answered by any number of living witnesses to the contrary, show that positive law which makes it thus unanswerable. There is certainly nothing in the Constitution of the United States which makes it so, as there is no act of Congress to that effect.

A certificate of a board of returning officers has nothing to liken it to a judicial record of contentions between parties. The proceeding is *ex parte*; or, if there be parties, the other States of the Union are not represented, however much their rights may be affected; the evidence is in part at least by one-sided affidavits; the Judges may be interested and partial. What such a board has about it to inspire confidence or command respect, it is hard to perceive. If there be any presumption in its favor or in favor of the justice of its judgments, the presumption is as far from indisputable as a disputable presumption can ever be.

To recapitulate, we may formulate the question in this manner: *Whom has the State appointed to vote in its behalf for President?* The manner of appointment is the vote of the people, for the Legislature has so directed. Who, then, are appointed by the people? To state the question is nearly equivalent to stating what evidence is admissible; for the question is not, who received the certificate, but who received the votes; and any evidence showing what votes were cast and for whom is pertinent, and must therefore be admissible, unless excluded by positive law. The law by which this question is to be decided is not State but Federal. If it were otherwise,

the State officers might evade the Constitution altogether, for this ordains that the appointment shall be by the State, and in such manner as its Legislature directs; but, if the State certificate is conclusive of the fact, the State authorities may altogether refuse obedience to the Constitution and laws, and save themselves from the consequences by certifying that they have obeyed them. And they may in like manner defraud us of our rights, making resistance impossible, by certifying that they have not defrauded. Indeed, they might make shorter work of it, and *omit the election altogether, writing the certificate in its stead.*

If the Governor of Massachusetts were to certify the election of the Tilden electors, and their votes were to be sent to Washington, instead of those which the Hayes electors have just given in the face of the world, must the Tilden votes be counted? Must this nation bow down before a falsehood? To ask the question is to answer it. There is no law to require it; there can be none until American citizens become slaves. The nature of the question to be determined, the absence of any positive law to shut out pertinent evidence, the impolicy of such an exclusion, its injustice, and the impossibility of maintaining it, if by any fatality it were for a time established—all these considerations go to make and fortify the position that whatever body has authority to decide how a State has voted, has authority to draw information from all the sources of knowledge. The superstitious veneration of a certificate, which would implicitly believe it, and shut the eye to other evidence, is as revolting as that of the poor negro in the swamps of Congo, who bows down before his fetich. The idolaters mentioned in Scripture, who took a tree out of the wood, burned one part of it, hewed the other, and then worshiped it, were only prototypes of the men of our day, who bow down before a piece of paper, signed in secret fourteen hundred miles away, asserting as true what they know or believe to be false.

It were useless, therefore, to inquire how far the laws of a State make the certificate of a board of canvassers or of returns conclusive evidence of the result of an election held in the State. It may be admitted that the Supreme Court of Louisi-

ana, for example, has denied its own competency to go behind the certificate of the board; but even that decision is entitled to no respect, being made in contravention of an express provision of the State statute, as the dissenting opinion of one of the Judges clearly shows. Every other State of the Union, save perhaps one, has decided that the certificate is impeachable, even in a case where the statute declares that the canvassers shall "determine what persons have been elected." The opinion of the Supreme Court of Wisconsin, an extract from which is given in a note at the end of this article, states and decides the point with clearness and unanswerable force.

If what has been said be founded in sound reason, the two Houses of Congress, when inquiring what votes are to be counted, have the right to go behind the certificate of any officers of a State, to ascertain who have and who have not been appointed electors. The evidence which these Houses will receive upon such inquiry, it is for them and them only to prescribe, in the performance of their highest functions and the exercise of their sincerest judgment.

#### THE REMEDY FOR A WRONG COUNT

is the remaining question. Hitherto, I have endeavored to state in a popular manner the existing law, as I understand it. I will now ask a consideration of the needs of future legislation. If there be anything obscure in the present law, Congress has the power to make it clear; if there be danger in our present condition, Congress can remove the danger. There are various ways of doing it.

One is to provide for a judicial committee of the two Houses, to sit in judgment, as if they were Judges, and pronounce upon the result of the evidence. The English House of Commons used to reject or admit members, from considerations of party. Englishmen have thought that they had at last succeeded in establishing a tribunal which would decide with impartiality and justice. We should be able to devise means equally sure of arriving at a result just in itself and satisfactory to all. The considerations in favor of a judicial committee of the two Houses are cogent, though they may not be

conclusive. They are, the necessity of a speedy decision, and the desirableness of keeping, if possible, the ordinary courts out of contact with questions of the greatest political significance.

But if it be found impossible to agree upon the formation of such a committee, then a resort to the courts should certainly be had. The public conscience must be satisfied that the person sitting in our highest seat of magistracy is there by a just title; and it can be satisfied of that, in doubtful cases, only by a judicial inquiry.

An act of Congress might provide either for the case of a double declaration of the votes, one by each House of Congress, or of a single declaration by the two Houses acting in concert. In either case the Supreme Court could be reached only by appeal, and the Court of first instance might be either the Supreme Court of the District of Columbia or any of the Circuit Courts. The Court of the District should seem to be the most convenient, the most speedy, and the most appropriate, as being at the seat of government.

For the case of a double declaration it might be provided that, if upon the counting of the votes the Senate should find one person elected and the House another, an information should be immediately filed in the Supreme Court of the District, in the name of the United States, against both the persons thus designated, alleging the fact, and calling upon each to sustain his title. The difficulty of this process would be how to expedite the proceedings so that a decision should be had before the 4th of March, in order to avoid an interregnum. But I think this difficulty could be overcome. To this end, the time of the courts engaged in the case should be set apart for it. The rival claimants would naturally be in Washington, prepared for the investigation. The evidence previously taken by the two Houses—for they would assuredly have taken it—could be used, with the proper guards against hearsay testimony, and any additional evidence necessary would probably be ready, if the claimants or their friends knew beforehand that a trial was likely to be had. It might, indeed, happen that the questions to be decided would involve little dispute about facts; as, for example, the present Oregon case. It



should be provided that the trial must be concluded and judgment pronounced within a certain number of days, either party being at liberty to appeal, within twenty-four hours after the judgment, to the Supreme Court of the United States, by which the appeal should be heard and decided before the 4th day of March.

In case of a single declaration, and consequent induction into office, an information might be filed in some one of the Circuit Courts in the names of the United States and the claimant, against the incumbent, and proceedings carried on in the ordinary manner of proceedings in the nature of *quo warranto*.

Any lawyer could readily frame a bill to embrace these several provisions. An amendment of the Constitution would not be necessary. The provisions would operate as a check upon fraud. They would furnish a more certain means of establishing the right. The objection that the courts would thus be brought into connection with politics is the only objection. But the questions which they would be called upon to decide would be questions of law and fact, judicial in their character, and kindred to those which the courts are every day called upon to adjudge. The greatness of the station is only a greater reason for judicial investigation. The dignity of the Presidential office is not accepted as a reason why the incumbent should not be impeached and tried. It can be no more a reason why a usurper should not be ousted and a rightful claimant admitted. The President is undoubtedly higher in dignity and greater in power than the Governor of a State, but the reasons why the title of a Governor should be subjected to judicial scrutiny are of the same kind as those which go to show that the title of a President of the United States should be subjected, upon occasion, to a like scrutiny. The process was tried and found useful in the Capitol of Wisconsin, and, for similar reasons, it may be tried and found useful in the Capitol of the Union. So far from degrading the office, or offending the people to whom the office belongs, it can but help to make fraud less defiant and right more safe, and add a new crown to the majesty of law. That triumph of peace and justice in Wisconsin has, to the eye of reason, given an added

glory to her prairies and hills, and a brighter light to the waters of her shining lakes.\*

**\* OBSERVATIONS OF CHIEF-JUSTICE WHITON, OF WISCONSIN, RESPECTING THE FORCE OF  
A CERTIFICATE OF CANVASSERS.**

"Before proceeding to state our views in regard to the law regulating the canvass of votes by the State canvassers, we propose to consider how far the right of a person to an office is affected by the determination of the canvassers of the votes cast at the election held to choose the officer. Under our Constitution, almost all our officers are elected by the people. Thus the Governor is chosen, the Constitution providing that the person having the highest number of votes for that office shall be elected. But the Constitution is silent as to the mode in which the election shall be conducted, and the votes cast for Governor shall be canvassed and the result of the election ascertained. The duty of prescribing the mode of conducting the election and of canvassing the votes was, therefore, devolved upon the Legislature. They have accordingly made provision for both, and the question is, whether the canvass, or the election, establishes the right of a person to an office. It seems clear that it can not be the former, because by our Constitution and laws it is expressly provided that the election by the qualified voters shall determine the question. To hold that the canvass shall control, would subvert the foundations upon which our government rests. But it has been repeatedly contended in the course of this proceeding that, although the election by the electors determines the right to the office, yet the decision of the persons appointed to canvass the votes cast at the election settles finally and completely the question as to the persons elected, and that, therefore, no court can have jurisdiction to inquire into the matter. It will be seen that this view of the question, while it recognizes the principle that the election is the foundation of the right to the office, assumes that the canvassers have authority to decide the matter finally and conclusively. We do not deem it necessary to say anything on the present occasion upon the subject of the jurisdiction of this Court, as that question has already been decided, and the reason for the decision given. Bearing it in mind, then, that under our Constitution and laws it is the election to an office, and not the canvass of the votes, which determines the right to the office, we will proceed to inquire into the proceedings of the State canvassers, by which they determined that the respondent was duly elected" (4 Wis., 792).

## THE VOTE THAT MADE THE PRESIDENT.

Pamphlet by Mr. Field, published in March, 1877.

At ten minutes past four o'clock on the second morning of the present month (March, 1877), the President of the Senate of the United States, in the presence of the two Houses of Congress, made this announcement: "The whole number of the electors appointed to vote for President and Vice-President of the United States is 369, of which a majority is 185. The state of the vote for President of the United States, as delivered by the tellers, and as determined under the Act of Congress, approved January 29, 1877, on this subject, is: for Rutherford B. Hayes, of Ohio, 185 votes; for Samuel J. Tilden, of New York, 184 votes"; and then, after mentioning the votes for Vice-President, he proceeded: "Wherefore I do declare, that Rutherford B. Hayes, of Ohio, having received a majority of the whole number of electoral votes, is duly elected President of the United States for four years, commencing on the 4th day of March, 1877."

Mr. Hayes was thus declared elected by a majority of one. If any vote counted for him had been counted on the other side, Mr. Tilden, instead of Mr. Hayes, would have had the 185 votes; if it had been rejected altogether, each would have had 184 votes, and the House of Representatives would immediately have elected Mr. Tilden. One vote, therefore, put Mr. Hayes into the Presidential office.

To make up the 185 votes counted for him, 8 came from Louisiana and 4 from Florida. Whether they should have been thus counted is a question that affects the honor, the conscience, and the interests of the American people. There is not a person living in this country who has not a direct concern in a just answer. Not one will ever live in it whose re-

spect for this generation will not depend in some degree upon that answer.

The 12 votes were not all alike. Some had one distinction, some another. But, not to distract attention by the discussion of several transactions instead of one, and because one in the present instance actually determined the result, I will confine my observations to a single vote. For this purpose let us take one of the votes from Louisiana, that, for instance, of Orlando H. Brewster.

Brewster was not appointed an elector, inasmuch as he did not receive a majority of the votes cast by the people of Louisiana, and inasmuch also as he could not have been appointed if he had received them all.

#### HE DID NOT RECEIVE A MAJORITY OF THE VOTES.

It would be a waste of time and patience to go through the testimony taken by the two Houses of Congress for their own information, before they consented to call in the advice of the Electoral Commission. The evidence of wrongs on both sides, and the irreconcilable contradictions of witnesses, made President Seelye and Mr. Pierce, of Massachusetts, declare it to be impossible for them to reach a satisfactory conclusion upon the facts, and compelled them to break away from their party, and refuse to abide by the advice of the Commission. There are certain things, however, which we know beyond dispute, or about which there is and can be no controversy, and these only will I mention. We know that the number of votes cast in Louisiana for the Tilden electors, taking the first name on the list as representing all, was 83,723, but that the certificate of the returning board put them at 70,508, turning Mr. Tilden's majority of more than 6,000 into a majority for Mr. Hayes; and we know that the reduction was made by throwing out more than 13,000 votes of legal voters voting legally for Mr. Tilden, and that more than 10,000 of these were thrown out upon the assumed authority of a statute of Louisiana, which in terms gave the board power to throw out votes, upon examination and deliberation, "whenever, from any poll or voting-place, there shall be received the

*statement of any supervisor of registration or commissioner of election, in form as required by section 26 of this act, on affidavit of three or more citizens, of any riot, tumult, acts of violence, intimidation, armed disturbance, bribery, or corrupt influences, which prevented, or tended to prevent, a fair, free, and peaceable vote of all qualified electors entitled to vote at such poll or voting-place."*

Whether the statute itself has its warrant in the Constitution is a question not necessary now to be considered. For my part, I can not see the authority for taking out of the ballot-boxes the ballots of lawful voters and throwing them away because other voters did not vote, whatever may have been the cause of their not voting, whether they were frightened, foolish, or perverse. I can not for the life of me perceive that the State can be held to have elected persons whom it did not in fact elect, because it is conjectured, or even made probable, that if voters who kept away from the polls had in fact attended and voted, they would have made a majority for these persons.

Without going into that question, however, and assuming for the sake of the argument that the statute had all the authority of the most clearly valid statute that was ever passed, it is certain that the only ground upon which a vote could have been thrown out, for intimidation or other corrupt influence, was the statement of a supervisor of registration or commissioner of election, founded upon the affidavits of three citizens. When, however, the vote of Louisiana was before the Electoral Commission, the following offer was made by counsel :

"We offer to prove that *the statements and affidavits* purporting to have been made and forwarded to said returning board in pursuance of the provisions of section 26, of the election law of 1872, alleging riot, tumult, intimidation, and violence, at or near certain polls, and in certain parishes, *were* falsely fabricated and *forged* by certain disreputable persons *under the direction*, and with the knowledge of *said returning board*, and that said returning board, knowing said statements and affidavits to be false and forged, and that none of the said statements or affidavits were made in the manner or form or within the time required by law, did knowingly, willfully, and fraudulently fail and refuse to canvass or compile more than 10,000 votes lawfully cast, as is shown by the statements of votes of the commissioners of election."

This offer the Commission rejected by a vote of eight to seven.

In the Commission Mr. Abbott moved the following :

*“Resolved, That testimony tending to show that the so-called Returning Board of Louisiana had no jurisdiction to canvass the votes for electors of President and Vice-President is admissible.”*

This was rejected by the same vote.

In explaining the reason of their decision in the case, the Commission used the following language :

*“And the Commission has, by a majority of votes, decided, and does hereby decide, that it is not competent, under the Constitution and the law as it existed at the date of the passage of said act, to go into evidence *alimunde*, the papers opened by the President of the Senate, in the presence of the two Houses, to prove that other persons than those regularly certified to by the Governor of the State of Louisiana, on and according to the determination and declaration of their appointment by the returning officers for elections in the said State prior to the time required for the performance of their duties, had been appointed electors, or by counter-proof to show that they had not; or that the determination of the said returning officers was not in accordance with the truth and the fact, the Commission, by a majority of votes, being of opinion that it is not within the jurisdiction of the two Houses of Congress, assembled to count the votes for President and Vice-President, to enter upon a trial of such questions.”*

Whether, therefore, the decisions of the Commission or the reasons given for them be sound or unsound, it may be assumed that *Brewster did not receive a majority of the votes cast by the people of Louisiana, and that the action of the returning board in cutting down the majority of his competitor, so as to reduce it below his, was taken without jurisdiction, and upon the pretense of statements and affidavits which they themselves had caused to be forged.*

**BREWSTER COULD NOT HAVE BEEN APPOINTED ELECTOR IF HE HAD RECEIVED THE VOTES OF ALL THE PEOPLE OF LOUISIANA.**

He had been made Surveyor-General of the United States for the District of Louisiana on the 2d of February, 1874; was recommissioned by President Grant on the 11th of Feb-

ruary, 1875, and is at present exercising the office. Whether he has ever been out of the office depends upon the facts now to be mentioned. Eight or nine days after the election of November 7, 1876, at which he was a candidate on the Republican electoral ticket, there was received at the Department of the Interior, from the hands of the President, this letter:

MONROE, *November 4, 1876.*

DEAR SIR: I hereby tender my resignation of the office of Surveyor-General of the State of Louisiana, with the request that it be accepted immediately. With many thanks for your kindness,

I remain, yours respectfully,

H. BREWSTER.

U. S. GRANT, *President United States.*

When the letter was written does not appear. It is certain that Brewster was acting as Surveyor-General on the 10th of November.

On the 16th of November a letter was addressed to the Commissioner of the General Land-Office, as follows:

DEPARTMENT OF THE INTERIOR, }  
WASHINGTON, *November 16, 1876.*

SIR: I have received the resignation of Mr. Orlando H. Brewster, Surveyor-General of Louisiana, which he has requested may take effect immediately. Please inform Mr. Brewster that his resignation has been accepted by the President, to take effect November 4th instant, that being the date of his letter of resignation to this Department.

Very respectfully,

Z. CHANDLER, *Secretary.*

At what time, if ever, the Commissioner informed Brewster of the acceptance of his resignation we do not know, but it could not have been earlier than the 20th of November.

On the morning of the 6th of December, the four men who assumed to act as the Returning Board of Louisiana filed in the office of the Secretary of that State a certificate that Brewster, with seven other persons, had been appointed Presidential electors. There was then on the statute-book of Louisiana this enactment:

"If any one or more of the electors chosen by the people shall fail from any cause whatever to attend at the appointed place at the hour of

4 P. M. of the day prescribed for their meeting, it shall be the duty of the other electors immediately to proceed by ballot to fill such vacancy or vacancies."

What Brewster did is thus told by Kellogg, one of the Hayes electors, on his examination at Washington in January :

" Q. Did Levissee and Brewster vote at the meeting of electors ?

A. I believe they did.

Q. Was not an appointment made for somebody to fill Brewster's place ?

A. I believe that that is the case.

Q. Who was appointed to fill Brewster's place ?

A. Brewster himself.

Q. The same man ?

A. The same man.

Q. Were you also instructed by these committees (National and Congressional Republican Committees) how to dispose of Brewster and Levissee ?

A. My recollection is that some one of the electors had received a letter suggesting that, in case of a vacancy or in case of the absence of Levissee and Brewster, they should be chosen in their own places. That is my recollection.

Q. And yet they absented themselves from the electoral college, and you filled their vacancies with themselves ?

A. They were absent from the college when the college met, and we filled their vacancies by themselves."

Being thus installed, they voted for Mr. Hayes within an hour after they were chosen to fill their own vacancies ; and three days afterward Brewster addressed the following letter to the President :

NEW ORLEANS, LOUISIANA, *December 9, 1876.*

SIR: I respectfully apply to be appointed Surveyor-General for the District of Louisiana. Commendations from prominent gentlemen will be submitted to your Excellency to justify the appointment.

I have the honor to remain

Your very obedient servant,

ORLANDO H. BREWSTER.

U. S. GRANT, *President United States, Washington, D. C.*



The reappointment was made on the 5th of January, 1877. The Chief of the Appointment Division in the Interior Department was asked and testified about it as follows:

*Q.* Who recommended his appointment in January?

*A.* I think the probability is (although there is no evidence of it) that there was no recommendation, further than his own application to the President.

*Q.* You do not know of any recommendation?

*A.* I do not know of any.

*Q.* There is none on file?

*A.* There is none on file to the best of my knowledge. There is none on file in the Interior Department."

Who does not perceive the shallow trick by which Brewster pretended to have divested himself of his Federal office that he might vote, only to be reinvested as soon as he had voted?

The letter of resignation, with its false date, and its pretended acceptance, to take effect as of a time past, was an evident sham to make it appear that he was not holder of a Federal office when he was elected; his affecting to be absent on the 6th of December, and coming in immediately to fill the vacancy occasioned by his own absence, in order to make it appear that his appointment was made on that 6th of December, instead of the 7th of November, and his barefaced application on the third day thereafter to be reappointed to the Federal office, from which he could not possibly have perfected his resignation before the 20th of November—all these were but so many contrivances to evade the highest enactment known to our civil polity. In the eye of reason and of law, he acted during the whole period under that influence of office which it was the design of the Constitution to prevent, and he must have entered more thoroughly into the work of his Federal master than if he had not gone through the form of resigning, inasmuch as that placed him, more than before, in his master's power.

Let us now place side by side the commandment of the Constitution and the resolution of the Electoral Commission:

## COMMANDMENT.

*"No Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."*

## RESOLUTION.

"The Commission, by a majority of votes, is also of the opinion that it is not competent to prove that any of said persons, so appointed electors as aforesaid, held an office of trust or profit under the United States at the time when they were appointed, or that they were ineligible under the laws of the State, or any other matter offered to be proved *aliunde* the said certificates and paper."

It would be unjust to cast upon the Electoral Commission the blame of all the wrong that has been practiced in this Presidential count. The Commission was but a council of advice, which Congress might have taken or not, as it pleased, the only condition being that, in order to reject it, both Houses must have agreed. The responsibility of the final decision lay, after all, upon Congress, or rather, upon the Senate, which voted throughout to follow the Commission.

The facts thus briefly recited present certain questions—moral, political, and legal—which can not be considered too soon for our good repute and our self-respect.

## THE MORAL QUESTION.

Whatever differences of opinion there may be about the political and legal questions involved, there can be none about the moral. The Presidential office is the gift of the people of the several States, of their own free-will, expressed according to the laws. A falsification of that will is an offense against the State where it is committed, and against all the States. If the falsification is beyond the reach of the law, it is not beyond the reach of the conscience. A robbery is none the less a robbery because it is beyond the range of vision or the arm of justice. If the possessor of an estate has entered through the forgery of a record or the spoliation of a will, which although believed by every neighbor is beyond judicial proof, all the world pronounces his possession fraudulent, even though he scatters his wealth in charities and gathers many companions

around his luxurious table. The example is corrupting, but it is against the eternal law of justice that the act should be respected or the actors continue for ever to prosper.

It is no answer to these observations to say that frauds have been practiced on the other side. Unhappily, there is too much reason to believe that neither party is free from practices which are at once a scourge and a dishonor. Neither has the disgraceful monopoly of such practices, whichever may have the bad preëminence. But this is certain: one wrong neither justifies nor palliates another.

There is no set-off known to the moral law. Because A has defrauded B, that is no reason why B should defraud A. If it were so, society would go on for ever in a compound ratio of crime. The first breach of the law would furnish excuse for the second, and their progeny would follow in sad progression to the end of time. This is not, however, the moral condition of the world. The *lex talionis* has been abolished by the law of civilization and the higher law of the gospel.

In this case of Louisiana there can be neither excuse nor palliation for the misconduct of the returning board.

On the 10th of November, President Grant telegraphed to the General of the Army instructions about troops in Louisiana and Florida, and added that "*no man worthy of the office of President should be willing to hold it if counted in or placed there by fraud.*" Either party can afford to be disappointed in the result. *The country can not afford to have the result tainted by the suspicion of illegal or false returns.*" And again: "The presence of citizens from other States, I understand, is requested in Louisiana, to see that the board of canvassers makes a *fair count of the vote actually cast.* It is to be hoped that representative and fair men of both parties will go."

Did the President of that day misrepresent his party, or his successor, or has the party changed and the successor also? Had the virtuous impulses of November faded away in February? Was there a change of heart or a change of opportunity? Neither Congress nor the Electoral Commission could give an *honest* title, without investigating the honesty of the transac-

tions on which the title was founded ; and yet a President has been installed, in the face of rejected offers to prove frauds, the grossest, the most shameless, and the most corrupting, in all our history.

Then what was the object of the committees of each House of Congress, sent into the disputed States ? Was it to blind the people ? Was it to conceal a meditated fraud ? On the very first day of the session, December 4th, Mr. Edmunds, in the Senate, moved certain resolutions, of which this was one :

*"Resolved further, That the said committee" (the Committee on Privileges and Elections) "be, and is hereby, instructed to inquire into the eligibility to office under the Constitution of the United States of any persons alleged to have been ineligible on the 7th day of November last, or to be ineligible as electors of President and Vice-President of the United States, to whom certificates of election have been, or shall be, issued by the Executive authority of any State, as such electors, and whether the appointment of electors, or those claiming to be such, in any of the States, has been made either by force, fraud, or other means otherwise than in conformity with the Constitution and laws of the United States, and the laws of the respective States ; and whether any such appointment or action of any such elector has been in any wise unconstitutionally or unlawfully interfered with ; and to inquire and report whether Congress has any constitutional power, and, if so, what and the extent thereof, in respect of the appointment of or action of electors of President and Vice-President of the United States, or over returns or certificates of votes of such electors," etc.*

Was all this parade of committees sent hither and thither, summoning witnesses from far and near, committing the recusant to prison, and looking into State archives—was all this a mock show, a piece of pantomime, for the amusement of the lookers-on, while conspirators were plotting how to conceal what they pretended to be wishing to discover ? Taken all in all, the sounding profession, the bustling search, and the studied concealment, make a drama, half comedy and half tragedy, the like of which this generation has not seen till now, but the like of which it and its successors may see many times, if the audience does not hiss the play, and remit the actors to the streets.

It has been objected, as a reason for not receiving offered evidence, that there was not time to take it before the 4th of

March. How was that known? Perhaps it could have been taken in an hour. Why was not the question asked, how much time the evidence would take, before it was excluded? If the certificate was false, and the falsehood was susceptible of proof, every effort possible should have been made to receive it, and receive it all. It is not commonly accepted as good reason for not searching after the truth, that the search may be difficult. Nor is it an unusual occurrence to require an argument or decision to be made within a period limited. Ten minutes' speeches in Congress, two hours' argument in the Supreme Court, a jury shut in a room until they agree upon a verdict, a court required by statute to render its decision by a day fixed, are not so strange as to be remarkable, or found in practice so embarrassing as to cause the practice to be abandoned.

Nor is it any answer to say that, if the offer of evidence had been accepted, the proof would have fallen short of the offer. That does not lie in the mouth of any one to say, who excluded the evidence, or justified its exclusion. The characters of the counsel who made the offer, and of the commissioner who moved its acceptance, are a guarantee not only of their good faith, but of a reason for their belief. No man has any right to deny that the proof offered would have been made good, who refused the opportunity. They who closed their ears should in decency keep their mouths shut. But it was not the counsel and the commissioner alone who believed that the proof offered would be made good. Every one who witnessed the examinations in Washington, every one who read the testimony taken by the Congressional Committees in Louisiana, must have been satisfied that the conduct of the returning board was throughout unlawful, wicked, and shocking, to the last degree.

The title of the acting President, however valid in law, if valid at all, is tainted with fraud in fact. There was fraud in certifying that Brewster had received a majority of the votes of Louisiana, and fraud in attempting to evade that part of the Constitution which pronounced his disqualification. When the Electoral Commission advised Congress, and Congress accepted, by not rejecting, the advice, that fraud could not be

proved, that advice being but the equivalent of saying that fraud was of no consequence; when it advised that the incompetency of the returning board, for want of jurisdiction, could not be proved, such proof being but the equivalent of proof that the pretended board was not a board at all; when it advised that the forgery, by direction of the board, of the statements and affidavits on which it pretended to act as true could not be proved, that proof being but the equivalent of proof that the pretended statements and affidavits were not statements and affidavits at all; when it advised that the barrier raised by the Constitution against the appointment of a Federal officer to choose a Federal President was not a barrier at all—the moral sense of the whole American people was shocked. No form of words can cover up the falsehood; no sophistry can hide it; no lapse of time wash it out. It will follow its contrivers wherever they go, confront them whenever they turn, and as often as one of them asks the suffrages of his countrymen, he may expect to hear them reply, "Why do you reason with us, why seek to persuade us into giving you our votes, you that have taught us such a contempt for votes, that one fraudulent certificate is better than ten thousand of them?"

#### THE POLITICAL QUESTION.

The advice of the Commission, with the consequent action of Congress, was a virtual affirmation of this proposition, that if on the morning of the 6th of December the Federal General commanding in Louisiana had surrounded the State-House with soldiers, and marching in eight of his captains, had compelled the returning board to certify their appointment as electors, and the Governor to add his certificate, Congress and the country would have been obliged to accept the votes of these captains as the constitutional and lawful votes of Louisiana electors. Whoever supposes that the union of these States can endure under such an interpretation of their fundamental law, must be endowed with credulity beyond the simplicity of childhood. The doctrine is an open invitation to transgression and usurpation. The judicious disposition of a few troops in the capitals of disputed States, on the day of the electoral vote,

will perpetuate an Administration just so long as the audacity of a President, or the cupidity of his office-holders, may find it desirable; unless, indeed, it be found, as is most likely, that the ways of fraud are cheaper, easier, and less palpable, than the ways of force.

#### THE LEGAL QUESTION.

*As to the conclusiveness of the Governor's and canvassers' certificates*, the doctrine of the majority of the Commission and of the Senate is, that the certificate of the Governor, "*on and according to the determination and declaration*" of the State canvassers, can not be shown to be false, though it may have been obtained by force or fraud. This doctrine admits that the truth of the *Governor's* certificate can be inquired into, else why the qualification that it must be "*on and according to*" the canvasser's certificate? It is said to be good only when in such accord; therefore, when not in accord, it is good for nothing. We may, then, dismiss the Governor's certificate as of no account, and to be left therefore out of further discussion. The substance of the doctrine is, that the *certificate of the State canvassers* can not be contradicted.

This language must, of course, be understood as used in reference to the question at that time depending; that is to say, whether evidence to contradict or annul the certificate was then and there admissible. It had already been decided in the Florida case that no action of the State authorities, after the electors had voted, could affect the validity of the vote. Whether such action before the vote would have been of any avail was not decided, and will never be decided, unless a radical change is made in the laws, since, according to present legislation, the vote of the electors treads fast on the heels of their appointment. In Florida, they were declared appointed at three o'clock in the morning, and they voted at twelve, just nine hours afterward. In Louisiana the interval was even less. To suppose that any State action would or could be had in such an interval, or in any interval possible under present laws, would be as wild as to suppose that counting in a

President by fraud will not be followed by imitators at future elections.

Taking the doctrine, however, precisely as it was applied in the instance of Louisiana, it is this: that the certificate of State canvassers can not be impeached by evidence showing either that they had no jurisdiction to canvass the electoral vote at all, or that they had no jurisdiction to throw away votes that were actually cast, inasmuch as the power to throw away came into existence only when affidavits were laid before them, and there were no affidavits except such as they had caused to be forged, which, in the eye of the law, were not affidavits at all.

One would say that such a doctrine, held up in its nakedness, need hardly be attacked, for no man, not maddened by the fanaticism of party, would be found willing to defend it; yet, if not defended, the disposition of the Louisiana case must be pronounced as unsound in law as it was injurious in policy and offensive in morals. But I go further, and deny the conclusiveness of the canvassers' certificate under any circumstances. Suppose the question to be put thus: Can the certificate of State canvassers, acting within the scope of their authority, be questioned by evidence of mistake, fraud, or duress; what should be the answer? Most certainly it can, should be answered.

The statutes of the State may or may not have declared the effect of the certificate. In the case of Louisiana, this was the only statute relevant:

"The returns of the elections thus made and promulgated shall be *prima-facie* evidence in all courts of justice and before all civil officers, until set aside after a contest according to law, of the right of any person named therein to hold and exercise the office to which he shall by such return be declared elected."

Whatever doubt may have been expressed or felt whether this statute applied to the canvassers of a Presidential election, or whether the words *prima facie* really meant *prima facie*, or whether "courts of justice" and "civil officers" included the Electoral Commission and the two Houses of Congress, there can be no doubt that "the returns of the elec-



tions thus made and promulgated" do not include returns canvassed without jurisdiction, or made under cover of pretended affidavits which the returning officers themselves caused to be forged.

But, passing from this view of the subject, although this is sufficient to dispose of Brewster's pretensions, let us suppose a stronger case—the strongest supposable—that of a State Legislature directing not only the manner in which electors shall be appointed, but directing also that the certificate of the State canvassers shall be conclusive evidence that the State has appointed in the manner directed.

Because the Constitution provides that electors shall be appointed by the State, in the manner directed by its Legislature, it is thence inferred that the State must furnish the evidence of the appointment, and of course that none can be received except that which the State has furnished. And this is said to be the true States-rights doctrine. It is a strange sight, that of gentlemen clamoring for State rights who will not allow the people of Louisiana and South Carolina to take care of themselves; who are even now debating at Washington whether they shall not order new elections in those States, or which of two State governments they shall put up and which put down, and who since the war have treated the South as if no States were there, parceling it into military districts, and denying recognition until constitutional amendments were ratified. Their assertion of the conclusiveness of false and fraudulent canvassers' certificates, on the pretense of upholding State rights, should seem to be thrown in our faces by way of bravado, unless it be meant, indeed, for burlesque masking hypocrisy. But if the sight were not strange, and those gentlemen had been all along as careful of the rights of the States as they are of their own places, there is nothing in the claim for the conclusiveness of canvassers' certificates which receives support from the doctrine of State rights. On the contrary, the rights of the States are best preserved by fencing them against force or fraud, by leaving them untrammelled in their own action, and leaving us untrammelled in finding out what that action has been. No rights are ever lost by letting in the light.

A certificate can be conclusive evidence of the State's action, only when the act and the certificate are identical. If the Constitution had provided that there should be sent from each State a certificate signed by such persons as the Legislature might designate, declaring who should cast the electoral votes, then the only inquiry that could have been made at Washington would have been, whether the certificate sent up was so signed, and the persons therein mentioned had voted ; but the Constitution has provided nothing of the kind. It has provided that the State shall appoint in the manner directed by its Legislature, and the inquiry thereupon to be made at the Capitol is, " Whom has the State appointed in the manner directed ? "

We agree that the State has complete power, within certain limits, regarding the persons who may be appointed, to appoint its electors in any manner its Legislature may direct, but whether the State has done so is open to inquiry. Canvassers of votes are not the State, or the Legislature of the State, and their certificate is nothing but evidence. Two facts are to be shown : one, that the State has acted ; and the other, that the act has been in conformity to the directions of the Legislature. There is nothing in positive law or in the reason of things which, if the fact certified do not exist, requires that its falsity should not be open to proof.

The Electoral Commission and the Senate read the Constitution as if the words following in italics were part of it :

" Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress ; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector." *And the certificate of such officers as the Legislature of the State may designate shall be conclusive evidence, not only that the persons certified were appointed by the State, but that they were appointed in the manner directed by its Legislature, any mistake, fraud, or duress, of the certifying officers to the contrary notwithstanding.*

But the words of the Constitution as they stand do not carry with them the words in italics, or their substance ; and, if it had been proposed to add them when the Constitution was

presented to the people, I do not believe that they would have been accepted.

Had it been suggested to the freemen of Massachusetts or Connecticut that they should give to the Legislature of another State not only the right of designating how the electors should be chosen, whose voices might make a President for them, but also the right to designate a permanent board, with power to say, in the face of the truth, who had or had not been chosen, the voices of John Hancock and Oliver Ellsworth would surely have warned the good people of their native Commonwealths against so dangerous a proposition.

There is no necessary connection between an appointment and the certificate of it, unless the two acts are performed by the same persons. If the appointment of electors for Louisiana had been committed to the returning board, then there might be reason for saying that the certificate was conclusive, because they appointed when they certified. But the board had not the power of appointment. That power could not have been given to them, if the Legislature of Louisiana had so intended, and it did not so intend.

The power to give a conclusive certificate of appointment—that is, a certificate that precludes further inquiry—is virtually a power to appoint, since no one is then permitted to go behind the certificate to show that there was neither valid appointment nor form of appointment. Unless, therefore, the Legislature of Louisiana could, under the Constitution, confer upon the returning board power to appoint Presidential electors for Louisiana, it could not confer upon it power to give a conclusive certificate of appointment. The constitution of this returning board is known to us all. It was a permanent body, holding for an undefined period, or for life, consisting of four persons of one party, when there should have been five of different parties; and the four had persistently refused for years to select a fifth. To pretend that such a body was, or could lawfully be, empowered to appoint eight electors for the people of Louisiana, to match the eight who were appointed by the people of Maryland, would be simple effrontery; and most certainly, as I have said, if they could not appoint, they could not give an incontrovertible certificate of appointment. The

certificate is one thing ; the appointment another. The State appoints, and the Legislature directs the manner of appointment, but neither can make true that which is false.

*Now as to the person appointed.* Brewster was one of the very persons sought to be excluded by these words of the Constitution : "No Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector." He was, nevertheless, appointed, and he voted, and his vote made the President. How was this brought about ? The Commission answer, "That it is not competent to prove that any of said persons so appointed electors as afore-said held an office of trust or profit under the United States at the time when they were appointed." Of course, if it was not competent to prove it, the fact itself must have been of no importance.

Bentham's "Book of Fallacies" may be enriched, in another edition, with another fallacy, as remarkable as any he has recorded, to wit, that prohibition in the American Constitution means permission ! Talleyrand was once asked the meaning of non-intervention. "Non-intervention," he replied, "non-intervention means about the same thing as intervention." So, in our new constitutional vocabulary, prohibition means about the same thing as permission.

It was, indeed, mentioned in the course of the argument, though the Commission does not appear to have thought much of it, that Brewster, having resigned his Federal office and come in upon a new appointment to fill his own vacant place on the 6th of December, being then both present and absent, the question of eligibility did not arise. But enough has been said about this resignation sham. If such a trick had been played in respect to a note-of-hand of five dollars, there is not a justice of the peace who would not have denounced the trick as conferring no right and affording no protection.

The people of New York were amused, three or four years ago, with the feats of a juggler, who dressed one side of him as a man, and the other as a woman, and who turned about so quickly that he showed himself as two persons of different sexes in the same instant. Brewster's feat was not less remarkable : he was at once absent and present ; absent that he might

be appointed, and present that he might vote; went through the whole performance in less than an hour, absenting himself that he might be called in to be present, presenting himself though absent, voting ballots and signing certificates, showing himself to be as versatile and as agile as that master of jugglery.

Upon what theory the Commission held that evidence could not be received of Brewster's Federal office at the time of his appointment does not appear. He certainly was in the prohibited category. A marriage between persons within prohibited degrees is not good, even if consummated. The prohibited union of two offices in the same person should not be thought a legal union, simply because it is practiced. It has been said, though the Commission did not say it, that Brewster was at least elector *de facto*, and his vote was good, whatever may have been his title. Then why should we trouble ourselves about the returning officer's certificate? If, as elector *de facto*, his vote was good, then it was good without the certificate, and all that the Commission should have looked into was the *fact of voting*, without troubling themselves about the certificate of anybody or any other evidence of title. But, in truth, the distinctions between officers *de facto* and officers *de jure* have no application to the present case, and for this reason, among others, that two persons can not hold the same office *de facto*. It is of the essence of a *de-facto* possession of office that it should be exclusive. The Chancellor of New York said, in a judicial opinion, more than thirty years ago: "When there is but one office there can not be an officer *de jure* and an officer *de facto* both in possession of the office at the same time." This is true even when the office is a continuing one. Who, for instance, can say which of the rival Governors in Louisiana or South Carolina at this moment is the Governor *de facto*? In deciding between them, would not all the world pronounce this the only question, Which is Governor *de jure*? Much more is it true when the office is temporary, existing but for a moment, even if the doctrine of a *de-facto* officer can be applied to such an office at all. In the present case, Brewster went into the State-House and voted for Mr. Hayes; at the same instant his rival went into the same State-House and voted

for Mr. Tilden. It is absurd to pronounce Brewster, under such circumstances, an elector *de facto*, so as to make his vote for that reason good against his rival in the Tilden college, who was as much an elector *de facto* as was Brewster, and had this difference in his favor, that he was elected, and was eligible, while Brewster, the intruder, was not eligible, and was not elected. The only returns which went to the Electoral Commission were the double ones, where rival colleges of electors had acted at the same time in the same State. In those cases, as already observed, the question of a *de facto* elector could not arise. There was but one case, that of Wisconsin, where it could have arisen, and in that there was but a single return, which, of course, did not go to the Commission.

#### CONCLUSION.

Although these pages have been occupied with the vote of Brewster in the electoral college, it should not be understood that the other seven votes which were counted from that State, and the four votes counted from Florida, were any better than his. The one here considered had its peculiarities; the others had theirs. All of them were tainted, and the counting in of the President *de facto* was twelve times fraudulent. What may be the outcome I do not know. That will depend upon the spirit of this generation and the spirit of those to follow. It is a consolation to know that the questions will be reviewed by a tribunal higher than the Electoral Commission, higher even than the two Houses of Congress—the American people—from whose judgment there is no appeal but to the final judgment of history.

## CORRUPTION IN POLITICS.

Article by Mr. Field, published in the "International Review," January, 1877.

THE corruption of American politics is a phrase in everybody's mouth, not only in this country, but in others. What does it mean? Is it true? And, if true, what can we do for a change? These are questions which we propose, so far as we may be able, to answer in this paper.

The season is a fit one for such inquiries. As with persons so with nations, there are occasions especially fitted for self-examination. The present is one of them. The nation has just celebrated its hundredth birthday. The 4th of July, 1876, was not only an anniversary but it was a centenary. If there be, as beyond doubt there is, reason for national self-examination on every anniversary of the day of independence, there is a hundred-fold more reason for it now.

When it is said that our politics are corrupt, what is meant? Is it that offices are obtained by corrupt means, or that they are corruptly used, or both? Is it that government is corruptly perverted from its true ends? or is it merely that, from inattention, offices are unworthily bestowed or unworthily performed; in other words, that, though there is misgovernment, it is after all only negligent misgovernment? The truth is, we do not doubt, that both kinds of misgovernment prevail, the intentional and the negligent; and both in a certain sense are corrupt, for neither can exist without a violation of duty on the part either of the elector or of the holder of office. But in the ordinary sense that only is accounted corrupt which is intentionally wrong. It would be sometimes difficult to draw the line between the intentional and the merely negligent, because intentions being dispositions of the mind are invisible to mortal eye; but that there is a great deal of misgovernment is palpable enough, and much of it must be intentional. For proof of the former we need only the evidence of our senses, and with

their aid to compare what is with what should be. The result is before us, and the conclusion is irresistible.

In this discussion of the state of our politics we intend to make no comparison between the good and the bad in either our political or our social system.

We are not considering the whole subject of American society and government, with the view of striking a balance between the good that we do and the evil that we are doing or suffering. We will not stop to recount the glories of our history or the felicities of our condition. We lay aside for the time all thought of our moral and social, as distinguished from our political, state. In respect of the former, we forego the pleasure we should otherwise have in measuring our advance with the advance of other countries in our own time, or the advance of this country in these later days with its advance in what are called the better days of old. We refrain from pointing out our religious equality and freedom as worth more to the world than all the other triumphs of our time in arts or arms. We will not stop to congratulate ourselves, or remind our detractors, that we have established in the Western hemisphere a refuge for all those who from other quarters of the world have fled hither to escape poverty or oppression, and that we have received them, watched over them, encouraged and defended them. Nor will we pause to boast of that which, unlike what has always happened in the rest of the world, is yet the fitting supplement of our victories; that we have never after the heat of battle taken the life of a traitor, while the soil of Europe is red with the blood of men who in good causes as well as evil have been cloven down by the sword of power. We would forget for the moment the amount of our wealth, the development of our industry, the States we have founded, the cities we have built, the universities we have endowed, the number of our schools, the ever-swelling volume of our charities, the activity of our religious bodies, the comforts of our dwellings, the ease with which we travel, the diffusion of knowledge, and the plenty that fills the land as though the horn of abundance had been poured out over all its valleys and hills. We are fain to look now not on the bright but on the dark side of our shield, however much, if the two were placed side



by side, the brightness of the one might cover and illumine the darkness of the other. We would here show, not wherein we have succeeded and excelled, but wherein we have failed; that we may the better learn what to do to retrieve ourselves and to make our political equal to our moral and social condition.

It is strange that these conditions should ever be severed, and that political corruption should exist by the side of social purity; but that is one of the anomalies of our present social and political life, arising, we are inclined to believe, from causes accidental and removable, and not from an inherent and ineradicable vice.

When we speak of our political condition, we have to distinguish between that which is theoretical and that which is practical. In theory, our political constitution is irreproachable: it supposes a government of all, for the benefit of all; or, as the politicians put it, a government of the people, by the people, and for the people; but when this theory is reduced to practice, or rather, we should say, as it has been so reduced, the results are bad—almost as bad, we are tempted to say, as the promise was good.

There are few truths so much overlooked, or, if not overlooked, so soon forgotten, as that the excellence of a government depends more upon its administration than upon its constitution. The government of Trajan and the Antonines, faulty as was its constitution, gave to the Roman Empire peace, prosperity, and glory. The England of Elizabeth was as happy as the England of Victoria, and the history of China is a standing proof that a people may have wealth and pleasure under a mild though absolute despotism.

How is it, then, with us? Let us take to heart a few facts. We see a Federal Union which, being free from debt in 1836, now owes a debt of more than two thousand millions; which keeps in its service thirty thousand soldiers and a hundred thousand civil officers, and which pays for these hundred and thirty thousand servants more than twice as much as any European country pays for the like number. We see thirty-nine States owing an aggregate of three hundred and eighty-two millions, and of which eight pay neither principal nor interest;

we see counties, cities, and townships overwhelmed with debt; and all the while these various governments—Federal, State, and municipal—take from our people in taxes more than any government of Christendom takes from its people. We see offices which it is the function of the President to fill, and which it is his plain duty to fill with the truest and best, farmed out to Senators and Representatives in Congress. We see offices claimed and bestowed not for merit, but for party work, and as a natural consequence we see the public service inefficient and disordered. We see venal Legislatures and executive officers receiving gifts. We see the most depraved and least responsible newspaper press in all the world. We see a customs tariff which taxes 502 imported articles, and 972 different grades of these articles, some of them to the extent of 100 per cent. of their value, while the tariff of England taxes only 17, and the tariff of Germany 152, arranged in 37 classes.

We see depreciated paper money forced upon creditors who contracted for coin, and swaying prices back and forth like the swing of a weaver's shuttle. We see a commerce which once covered the seas now so diminished that in this present year the tonnage of our sea-going steamers is 289,000, while that of England is 3,332,000. Fifteen years ago we were advancing with the stride of a giant to the dominion of the seas; to-day the trident is in other hands.

And what an opportunity have we lost—for the time at least, and perhaps for ever! Behold the land and the coasts thereof: how its plains heave with fertility, and its borders lie in the midst of the seas! From the easternmost cape of Maine to the southernmost of Florida, and thence to the great river of Texas, and from the Gulf of California to Vancouver's Island, with its wondrous network of strait and inlet, what harbors lie open for lading and shelter, and what rivers to bear the products of the land to the entry of the sea!

And what is this prize that we have thus thrown away? What is it to have the dominion of the seas? It is to girdle the earth with your flag, the pledge of your protection and the symbol of your power; to bear in peace and war the primacy

of the world, "the excellency of dignity and the excellency of power"; to be able to send forth at will

"The armaments that thunderstrike the walls  
Of rock-built cities, bidding nations quake,  
And monarchs tremble in their capitals";

and, better yet, to send the ships of peace over all the world, to bring men and riches from every sea-watered shore. In the eye of law and of reason a ship is part and parcel of the territory of its nation. Every ship is therefore movable territory, and it may be a movable fortress. That nation which has the dominion of the seas can thus push its territorial domain and its fortresses over not only the three fifths of the earth's surface that are covered with water, but over all the other two fifths that can be reached by sea, to bear its speech, its arts, and its civilization into every zone and beneath every constellation of the sky. It is thus that the little island, our mother, fifty degrees north of the equator, with a length of scarce ten degrees and a breadth of six, has made the language of her people the language of a third part of the earth; has heaped up riches beyond all that is recounted in romance or song, and has made herself teacher and lawgiver in regions vast and fertile of which neither Phœnician nor Roman ever dreamed.

Behold an armament go forth upon the sea: it is like an army on the march, without the impediments that beset armies; it finds its way by the sun and by the stars; it stops not at night to set up its camp and surround itself with intrenchments; it builds no bridges across rivers, or roads through mountain-passes, but moves on wherever its keels can float and winds can waft them; coursing along every continent, circumnavigating every island, looking into every harbor, and making descents upon any shore whenever and wherever it will. Or, if you like not the show of war, behold a fleet of merchant-ships spreading their white wings and flying with the wind, bearing the harvests of one part of the earth to feed the inhabitants of another, or bringing back equivalents in fabrics for household comfort and all the luxuries "of commerce born."

What else do we see of the fruits of misgovernment, as if the picture were not dark enough already? We see Legislatures, State and Federal, granting monopolies to corporations and individuals, making gifts of the public lands, and bestowing subsidies from the public Treasury; we see the plunder of local communities by what is called local taxation, and we see demagogues clamoring for largesses under pretense, perhaps, of equalizing bounties, or other equally dishonest pretenses.

Then we see the open and flagrant breaches of trust in those who are clothed with the administration of the public property, as, for example, the frauds upon the city of New York perpetrated in 1870, the plunder of Southern States by imposed governments, and the free gifts to private corporations of rights over streets and highways which were built at the public cost.

The facts here recited prove beyond question that the corruption of our politics, so often asserted, is unfortunately true. Having now answered the first two questions, we will seek an answer to the third, What can we do for a change? The corruption is an effect of a cause behind it. What is this cause?

Men are intent on making money; that is for nine tenths of them the chief object of life. They who have different tastes and other objects; whether they seek power for the sake of power and the gratification which the possession of it gives; or fame for its sweet incense wafted to them living, and to be breathed upon their names hereafter; or science, searching for truth through earth and heaven; or art, blending the beautiful with the true; or pleasure, with its voluptuous charm, falsely claiming to be the supreme good; they are all insignificant in number compared with the great army which is pressing for ever toward the gates of Mammon.

Now, if it be once assumed that government is, or may be, converted into a machine for the making of money, and that the majority, who control it for the time being, may use it for that purpose, then there springs up as from the ground a host of hungry adventurers, office-seekers, and public plunderers, bent on using the power or patronage of the Government for

the enrichment of themselves. This is accomplished in various ways, sometimes by getting offices, or, if there be none already made, creating them for the occasion, sometimes by getting appropriations from the public lands or the public chest, or by procuring tariffs here and charters of corporations there.

Those classes of the people who are already engaged in profitable pursuits, being intent on their own methods of employment, concern themselves little with the ways of the politicians, hardly thinking, so long as they are prosperous themselves, how much their prosperity in the end may be lessened by political devices. That these are the fruits of wild notions prevalent about government and party we will endeavor to show. It is not strange that men should seek to make money. "The love of money is the root of all evil," says Holy Writ. What is strange about the matter is, that, in a country where it is the province of all to fashion and administer the government as they please, the machinery devised for the common benefit should be perverted, and so soon perverted, to the benefit of a portion of the people.

Here lies the root of the evil: the perversion of the power and patronage of the Government from public to private ends. And this is possible, and in fact happens, through a misapprehension by the people of the functions of government and the duties of its servants. What are the functions of government, according to the American theory? They are to protect each person in his individual rights, and to construct those common works, such as roads, bridges, canals, and aqueducts, which are for all, and in the construction of which all might be justly required to assist. For the performance of these functions certain agents are required, for whose appointment the laws must provide, and the necessities of the service constitute the warrant and the limit for the creation of offices. What, then, are the duties of the officers? They are to perform the services required by the laws, and to do nothing else which can interfere with that performance.

How grievously these functions and duties must be misapprehended by the people! We say must be, for there is no other way of accounting for the present condition of affairs.

The tree is known by its fruit. Here is misgovernment, and the people govern. Good government it is their interest to have. They must therefore intend to be well governed. And, inasmuch as they have the power to be well governed, and are in fact ill governed, their failure must be due to a misunderstanding somewhere. This misunderstanding will be apparent the moment we compare the theory of government and office as here defined, with the actual practice.

Government is the greatest combination of forces known to human society. It can command more men and raise more money than any and all other agencies combined. It is quite natural, then, that they whose theory of government, if they have any, does not forbid its use for any purpose they deem useful, should seek its intervention in such schemes as require great power or capital. How many well-meaning persons ask of Congress and the State Legislature grants of special charters or other monopolies, or subsidies to corporations, or gifts to private institutions or charities! And yet nearly every one of these is incompatible with the true theory of our government. It is time that they should all cease. Not one dollar should Congress or any State Legislature hereafter grant to any road, canal, or other enterprise owned by any corporation or individual. No matter what may be the pretense of advantage to the whole community or any part of it, so long as the thing does not belong to the State or nation, so that every citizen could be justly required to assist in the undertaking, the Government has no just right to give to it any of the property of the State or nation. This doctrine should be imposed upon every member of Congress and of the State Legislatures, and inexorably enforced by their constituents, and will be so imposed and enforced so soon as the people recover from their misapprehension of the true functions of their Government. For it should be held a fundamental maxim of our polity that neither monopolies nor favors of any kind to any class or person can ever be allowed.

What the nation or State can not justly do for itself it can not justly allow any lesser public authority to do. If the State of New York, for example, can not justly take stock in a railway corporation, not more justly can it authorize the mu-

municipality of New York to do so. Giving authority to municipalities to subscribe for shares in corporations is nothing but an agrarian measure to divide property among those who have not earned it. If, for example, in a town which contains one hundred voters who have property, and one hundred and fifty who have not, the majority of all have and exercise the power to buy stock or anything else not needed for municipal purposes, and pay for it out of the common treasury, that is a forced division of property, as unjustifiable and as liable to abuse as the agrarian laws of Rome; for, if the one hundred thought the investment a good one, they would have made it themselves, and the municipal vote is but another name for the virtual forgery of allowing one man to put the name of another to an obligation he would not himself assume. The power of the Legislature, so often asserted, and so far sustained by the courts, of compelling a district to tax itself against its will, and spend the money on a local object which it does not approve, is a power of more than doubtful propriety, and liable to infinite abuse. It may be necessary that the Legislature which sits at Albany should tax the people of the State for the expenses of their State government; but, when it comes to taxing the people of Erie for a supposed local improvement which they do not desire, its necessity is not perceived nor its justice admitted.

If the theory of government that we have been urging as the true one were once adopted and adhered to, not only would the nation and the States be saved the enormous expenditures consequent upon the grants now so lavishly made, but the number of offices would be materially lessened. There would remain fewer persons to be subjected to the wholesome discipline which we hope is in store for all holders of office, State and national.

The condition of our civil service is a scandal to the country. Not even the false notions of government that prevail cost us so much in money or lead to so wide a demoralization as the manner in which office is conferred and exercised. There are too many offices to begin with. Those which are permanent are greatly in excess of the public need; and there are besides commissions numberless and useless, perplexing

and confounding the people, and eating out their substance. There would be no occasion to go into details, if we had space for them now, as we have not, but we will venture the assertion that, taking the country together, two thirds of the present official force would do all the work needed, and do it better than it is now done.

Besides being too many in number, too many are unworthily bestowed. It could hardly be otherwise, considering the manner of the appointment and the condition of the service; the appointment being made for partisan work, and the condition being that the officer shall continue to work in the same way for the same party that placed him in office. Of course, the qualification required is, as it must be under such circumstances, not that he shall be the best person to perform the office, but the best person to do the party work—we had almost said the dirty work—done by him in the past and put upon him for the future. The performance will, of course, be equal to the qualification.

It has been computed that in the city of New York the head of every twelfth household is the holder of an office or public employment. He gets his living, then, out of the remaining eleven, and his family and friends help him. He is a mercenary, and they are his auxiliaries. How many mercenaries and auxiliaries can thus be counted up, in this much-abused city, who are dependent for their bread upon the party for the time being dominant in the city government? No wonder that politics as now pursued may be set down as a branch of business, and that this band of mercenaries—called variously office-holders or the people's civil servants—are found to be the supporters, as they are the instruments, of misgovernment, in direct antagonism to the rest of the people, whose interest it is to have good government, and whose hard lot it is to be obliged at every election to struggle against these mercenaries, and in the intervals to bear with their incompetency and indifference.

This, say the politicians and the Fourth-of-July orators, is a Government of the people by the people. How does it happen, then, to be so badly administered? Their servants are to blame, it is said; but who select and commission these ser-



vants? The people, directly or indirectly, but always the people. If the public servants were bad men when they were selected, that is the fault of those who made the selection; if they became bad afterward, and are not punished and removed, but suffered to continue in office, that also is the fault of the people, who either do not make proper laws or do not execute them when made. The maladministration is either necessary or unnecessary. If it is necessary—that is, if it is inseparable from popular government—then popular government is a failure. The question thus goes to the foundation of republican institutions and the strength and permanence of the foundation.

Do we sufficiently reflect upon the inferences deducible from the misgovernment that is admitted to prevail, inferences which affect the immediate agents—that is, those who have in their hands the selection and the supervision of the delinquents—and the ultimate agents—that is, the people who are the source of all power, and therefore responsible for its abuse? Whenever an official is found abusing his trust, the first inquiry should be, How did he get into his place? and second, How is he kept there? Do not let us mince matters, but speak the truth boldly. In ninety cases out of a hundred in which Federal officials have been found delinquent, the President is in fault for giving them the opportunity to do the wrong; and so, whenever a State official has gone wrong in the same way, the chances are ninety in a hundred that the Governor, or other appointing power, is in fault.

The disease of the civil service is incurable by any method short of an entire change in the manner of selection and the tenure of office. So long as offices are given as rewards for party service, and held by the tenure of more such service, just so long will they be badly filled and badly performed, and, what is worse, the poison of their atmosphere will spread itself over the whole people and into all the transactions of life.

While we do not expect in this generation the realization of our ideal of a perfect commonwealth, we yet think it possible that the officers of the Government may be selected for the same reason, and held to the same responsibility, as the

agents of other corporations, and of private persons. The better to contrast the methods of politics with the methods of business, let us take the case of any well-managed private corporation; one of the factories or furnaces, for example, which line the banks of the rivers of Massachusetts or Pennsylvania. The officers and agents are there selected for their supposed fitness. The members of the corporation expect of the directors the choice of the best men, without regard to friendships or private relations. What would be thought of a president or director who should appoint a superintendent because he was a relative or had done him a service, or because he expected a like service from him afterward? How long would a corporation managed in that way retain the confidence of investors? Suppose the managers of a transatlantic steamship company to appoint a master not for excellence in seamanship, but for personal favors to himself: how long would travelers trust their lives to the skill and care of such a master?

If a private person employs an agent to select an overseer for him, and the agent selects his friend instead of his enemy, the friend being incompetent and the enemy competent, every man will pronounce the agent the betrayer of his trust.

Is there any reason why the same principles should not be applied in the selection of agents for the Government? We are unable to discover any; we can not see the least difference in principle between the two cases.

The President of the United States has no more right to follow his friendship or his hate in appointing an officer of the United States, than has the president of a private corporation to follow his in appointing an officer of the corporation. The one is indeed public, and the other private. But what difference does that make in the principle? If there were any, then the same difference should be made between public and private property, and it should be held lawful to steal the former and not the latter, or rather the taking of the former without title should be held lawful and of the latter unlawful. We are shocked when we see an administrative officer acting with partiality in the discharge of his duties; and the charge of

favoritism is felt as a stain upon his honor. Why should we be less shocked when we see the office bestowed from partiality? If favoritism in the discharge of official duty by the officer appointed be a just reproach, why is not favoritism in the discharge by the appointing officer of his official duty in making the appointment equally a reproach?

And how can one who is conscious that he owes his place to personal favor or party zeal maintain that self-respect and independence which are necessary for the faithful discharge of his duty? He can not but feel that some of the dishonor of the appointment attaches to him. If a judge or a juror is supposed to have decided in favor of his friend because he was his friend, and not because he had the right, all men cry out, "Shame!" Is there any reason why an honest selection of one to perform official duties should be any less imperative than an honest decision upon a matter of private right?

"Population presses upon the means of subsistence," says the economist. Every man seeks a living. He will put in his claim whenever he has a chance. When he wants food or money, he will sell his services to get it. He sees that a certain number of men live on public employments; he knows no reason why he should not do the same, and so he claims an office, and, if there is not one for him already, he casts about to see if one can not be made for him. This is, in short, the *rationale* of our politics. Every new election is a new traffic in office; another trade, says the office-trader; another deal, says the office-gambler.

Government is instituted for certain definite objects. The Government can be carried on only by public agents, who are for that purpose and to that extent the servants of the public. The problem is, how to keep the Government confined to these objects, and how in the pursuit of them to prevent the agents turning masters, and using the Government for their benefit instead of being themselves used for its benefit. To solve the problem we have first to reduce the number of those agents to the lowest limit equal to the work, and next to make them attend to their duties, and these only. The tendency is always to increase the number, in order to increase their power, and then to increase their emoluments. The object is to get out of

the Government more than should be got ; and, as everything that is received from the Government is so much taken from the people, the tendency is to take from those who do not hold office for the benefit of those who do.

Suppose a community of a million persons, whose public business can be transacted by a thousand servants. If these thousand are dependent on party for office, they will become partisans, and will use all means not unlawful or dishonorable in their eyes to keep their party in power. They will work for it themselves, and all their dependents will do the same. They will offer inducements to others to help them. What inducement so strong as self-interest ? They will try to make it the interest of the others to help them, by promises of a like living upon the public. The thousand and their organized auxiliaries will prove too strong for the unorganized million.

These are considerations affecting the appointment of the officer. Those which affect the tenure of his place are equally important. Rotation in office is a favorite phrase of the politicians. Why they like it, it is easy to see ; for, there being many seekers after each office, the oftener an incumbent is turned out the greater the number enabled to get in. Suppose the rule of rotation applied to the factory, furnace, or steamer just mentioned, and that every two or three years the superintendent and the master were made to give place to a new hand, and so on at like intervals. Everybody would say that the managers of the corporation were idiots. What would be said of a community in which the rule should be applied to employment generally ? Take any of the little villages scattered among the hills, and say that no man shall be a shopkeeper, a shoemaker, or a blacksmith longer than four or five years, and must then make way for somebody else, or they must change places among themselves : how would the little village be likely to get on ? Or suppose a lawyer or physician to be permitted the exercise of his profession only four years, then to make room for a new aspirant : would the faculty of law or medicine be improved in quality thereby ? Is there any greater reason why the physician should continue to make himself more and more familiar with the art of healing, than why

the appraiser of goods at the custom-house should continue to make himself more and more conversant with the qualities and values of merchandise? It is inconceivable that rotation should be a good thing in those offices which require skill and practice and do not directly affect political measures. The only instances in which it can be reasonably safe are those where the office can be performed by one person as well as by another, and where familiarity with the duties gives no facility for their performance. Whenever that is the case, the rewards of party service may be distributed by chance or caprice, with no other resulting inconvenience than the excitement and demoralization of the struggle.

If the result of all this wrong were simply the selection of a set of incapables, to be succeeded after a short interval by another set of the same description, and so on *ad infinitum*, it would be bad enough, yet it might be possible nevertheless to carry on the government under such a load; but the tolerance by the community of the fraud in the selection, and the fraud in the performance, makes us all, to a certain degree, accomplices in the fraud, even though we be no more than passive spectators. The certain effect is to blunt the conscience of the officer and the conscience of the voter.

The contrast between the military and the civil service shows clearly the different effects of the two modes of selection and the two tenures of office: the tone of the one being high as the tone of the other is low. If rotation in office be a good thing in itself, why is it not applied to the army and navy? Why not every four years make the captains lieutenants, and the lieutenants captains; send General Sherman to the charge of a frontier post, and the frontier commandant to be general of the army?

What, then, is to be done? One plan, which some have suggested, does not appear to us practicable, or adequate if practicable; that is, the dispersion of the patronage, by making the minor offices elective by the people of the localities which they serve. Thus it has been proposed, in respect of Federal appointments, that the postmasters should be elected by the people whose letters they receive and distribute. This would require, in the first place, a great addition to the ma-

chinery of elections. But that is not the chief objection, however: postmasters are not the agents of the people who send and receive letters from their offices; they are the agents of the Federal Government, for which they act as receiving and distributing agents, and whose money they handle. There is a greater objection still; which is, that the people are already perplexed and confounded by the number of officers they elect, to such an extent that the local politicians are too much for them. In the State of New York we have gone on dispersing and decentralizing, until we have fallen into a sort of official anarchy. At the last general election there were seven tickets to be voted for at each poll, and on these seven tickets were twenty-two names of officers to be elected, besides the names of the thirty-five Presidential electors. One of the tickets had sixteen names, some known and some unknown, being nominated within a few days of the election; some acceptable and some unacceptable probably, to every elector. He was obliged, therefore, either to take the good and the bad together, or to go in the rain to a corner grocery and, scratching a portion of the names, insert others in their places.

Though the people are the ultimate source of all power, and directly or indirectly appoint all their servants, they may in all cases choose for themselves or delegate others to choose for them. Two questions then arise: one, to what extent the inferior agents should be selected by the principal ones; and the other, by what rules should the principal agents be bound in their selection. In New York we have acted for the last fifty years upon the theory of selecting nearly all the public servants directly by the people, in opposition to the former theory of electing one chief executive and giving him the appointment of all other executive and administrative officers.

After fifty years' experience of the new plan, most reflecting persons will say that the old is preferable. The reason is twofold: first, the electors are not so competent to choose wisely as a person selected for that purpose; and next, if they were competent, no mode has yet been discovered by which they can manifest a free choice. As to the first, our instincts are decisive; for no man in his senses would intrust to a crowd

the selection of a person to do his business; he would make the selection himself after inquiry into the fitness of the different persons. If he wanted a tutor for his son, or governess for his daughter, a superintendent for his factory, an overseer for his farm, a captain for his ship, he would make careful inquiry for the fittest person, and decide after comparing the qualifications of different candidates; but he would never think of asking a town-meeting to decide for him. Yet he should do so if the town-meeting were likely to make the wisest choice. Looking at the reason of the thing, we should reach the same result. The qualifications of persons for special trusts can be known to only a few. Take, for example, the office of State engineer and surveyor, an office lately existing in New York and filled by popular election, the only restriction upon the choice being that the person chosen must be "a practical engineer." It is difficult to speak with respect of such a provision. Who should determine whether particular individuals were or were not practical engineers? And who, of all the electors, could select the best of those particular individuals?

Suppose, however, that the people in their various electoral districts were best qualified to make a wise choice, what method has ever yet been devised of enabling them to choose the one upon whom the wise choice should be made? We know that in practice the choice is limited to two, three, or four candidates, who are themselves selected by nominating bodies, themselves in turn selected by a few out of the whole body of electors, without legal sanction, and meeting for a few hours or days in a tumultuous assembly, as noisy and about as unmanageable as the pretorian guards when they disposed of the Roman purple. If any plan could be devised by which each elector should name his candidate, and the sum of all their nominations be compared before the final choice of a candidate for a party, there might be some reason to think that the people had a free choice; but no such plan has yet been devised and put in practice. There are, besides, so many offices to be filled at an election, that the ticket presented to an elector on the morning of the election is so formidable in length, and so difficult to understand without a scrutiny longer than he can then give to it, that he generally takes it and throws it into the

box, without discrimination, in despair of understanding the merits or demerits of half the candidates. In nine tenths of the meetings held in this country for different purposes, where officers are to be chosen, nominating committees are first appointed to present candidates. What is this but a confession that a crowd is of all agencies the worst for making on the instant wise selections of committees or officers? And, lastly, the election by the people of a great number of officers is such a dispersion of responsibility as practically to nullify it altogether. For these reasons, and others which might be added if there were need, an election by the people directly of all or the greater number of the officers of a government is faulty in principle and ruinous in practice.

The legislators must, of course, be elected by the people. No other mode of selecting them is possible in a free and popular government. The chief executive in a republic must also be elected by the people or by the Legislature. To an election by the Legislature there are insuperable objections. A popular election is the only natural and unobjectionable method. And here, with the Legislature and the chief executive, popular election should stop, and every other office should be filled by one or the other of the two departments thus created, or by the concurrent action of the two. In this respect the Constitution of the United States appears to be as perfect an organic law as can be framed. Then the question arises, How can the best judicial and administrative officers be obtained? How shall the appointing power be guided in making its appointments? By the most perfect good faith always, and in respect to administrative offices by requiring from the candidates certain prescribed tests of qualification, without which no person can be eligible. By good faith is meant a single purpose to fill the office with the fittest person. This is the rule of the Constitution and the rule of conscience. No other is consistent with an honest discharge of public duty. If the office to be filled is political, then political opinions may enter into the question of fitness; but, if the office is not political, no preference can honestly be given to one person over another on account of political opinions or political services. The false maxim that to the victors in elections belong the



spoils of office is as infamous a one as was ever uttered, and as dangerous as it is infamous. The President of the United States, the Governor of each State, is bound, by the Constitution he is sworn to uphold, and by the dictates of probity and honor, to select the fittest man he can find for an office to be filled, be he an enemy or friend, personal or political, or the most favored or disfavored of the best or the worst of his supporters or opponents.

We know it is assumed, as an article of political morality, that the dispenser of patronage may rightfully postpone an enemy to a friend in the matter of preferment, and so he may if the two are in all respects equal in fitness; but, on any other supposition, private or political friendship has no place. Personal attraction or repulsion, between the appointing officer and the officer appointed, should have nothing to do with the appointment, unless the official duties of the two are such as necessarily to bring them into close personal relations. The needs of the service and the fitness of the servant are the only things to be measured and compared.

The measure called civil-service reform, rightly-understood, is worthy of all commendation. If it were assumed, however, that success in competitive examinations is a sure passport to office, the plan would fail, because such examinations will not develop all the elements necessary to make a good officer. But an examination, as a preliminary to the exercise of an administrative office, would be a great boon. It would exclude the ignorant and the idle from the competition. It would insure an amount of knowledge requisite for the place. And it would make the present discreditable scramble for office give way to an honorable ambition. But no civil-service reform can reach all the offices of the country, or even the most important, such as the legislative, judicial, and highest executive. For these nothing will suffice but to enlighten the voter and arouse his conscience. So soon as the legislative and highest executive offices are filled with honest and capable men, the judicial and administrative offices will be well filled also. No civil-service rules were needed for Washington when he was President. And though parties had not then been formed, struggling for office, as we now see them, he showed by his

example, in the circumstances of that time, what he would have done in the circumstances of ours.

If the electors were all honest and intelligent, we should have honest and intelligent officers elected. But they are not all such. Some are intelligent who are not honest, and many are honest who are not intelligent. The majority, the great majority, are honest. If it were not so, this Government would come speedily to an end. What is needed is a better apprehension of the function of government and the duties of its servants.

Our conclusions are, that the following maxims are fundamental and indispensable for the good government of this country :

1. That no grant or subsidy of any kind should hereafter be conceded to any private corporation or enterprise, no matter what may be the advantage promised or expected.

2. That no legislation or other act of government should be permitted which has for its object the pecuniary profit of any class or person.

3. That no office should be created or suffered to exist which is not necessary to the public service.

4. That in an appointment to office by any servant of the people, the fittest person to exercise it should be selected, without regard to party or personal relations.

5. That, in the class of administrative offices, no person should be appointed who has not passed successfully through a competitive examination ; and,

6. That, when once appointed, such officer, if his duties are not political, should hold his place during good behavior.

The final remedy for our political troubles lies in the intelligence and conscientiousness of the people. Amendments of constitutions and laws may do much, but they will not reach the root of the evil. As the disease is partly political and partly moral, so must be the cure. We are to address ourselves to the hearts and minds of the electors. Good or evil government depends upon the spirit of the people. The Government of England is now, as it has long been, in the hands of the educated classes ; yet how different is its pre-

ent administration from what it was in the days of Walpole! What has made this difference? The higher tone of public morality.

It must be made a point of honor and conscience with the appointing power in this country, wherever that power may reside, whether in president, governor, secretary, or legislator, that the authority to appoint is a high and sacred trust which can not be delegated, and must be neither perverted nor coerced.

The indifference of the citizen to his political duties is owing in part to his forgetfulness of the evils of misgovernment. "*Magna est veritas et prevalebit*" is an often-quoted and much-perverted maxim. Truth has often a hard time of it, is frequently crushed to earth, and will seldom prevail but by the aid of diligent and persistent co-workers. A profound student of human nature has observed that, if they thought it for their interest, there would be as many persons to deny as to admit the truth of the forty-seventh proposition of Euclid. That which may be affirmed of truth in general, may with greater force be affirmed of experiments in politics and government. People who are always exclaiming that things will come right, do not know what they are talking about. They will not come right of themselves, nor because they ought to be right, nor without the help of brave hearts and sturdy arms. No greater evil can befall a people than a bad government, by which we mean not merely a government badly constructed, but a government badly administered. The fairest portions of the earth, those which were once most fertile, most populous, and most opulent, are at this hour waste and desolate through misgovernment. Look at Persia, Turkey, and the states of Barbary! Every one of them flourished once in high prosperity; why are they not flourishing now? Their soil is the same, their sky has not changed. Misrule has brought them to ruin. Why has not Spain kept her place among the nations? It is scarce two hundred years since her scepter was lifted over half the world. In the East as in the West the orders which her swift couriers bore from the wood of Segovia were obeyed, not more in Europe than in half of America and in both the Indies. Let us take these lessons to heart. We can not have

misgovernment and prosper. We are not superior to the fortunes of our race.

It is sometimes said, as if to excuse the inattention of the citizen, that our government is a simple machine, not easy to get out of order, and easy to mend when it does. Never were there words with less of truth in them. Instead of calling it simple, call it the most complex of all the machines of government ever contrived for mutual protection and the common weal, and you will come nearer the truth. It is a curiously wrought, carefully adjusted, and most easily deranged piece of statesmen's workmanship. The simplest of all governments is an absolute monarchy, an autocracy like that of Russia under Catharine, or Spain under Philip II. A limited monarchy, like that of England, where all government is practically concentrated in one House of Parliament, is in simplicity the next.

Our American system of government, composed of Federal and State authorities, each independent of the other and supreme in its own sphere, and all working or designed to work without friction for the common good, has nothing simple about it. It is like the solar system, with its mazes of attractions and orbits: its sun, planets, and satellites. Not only is it the most complex, but it is also, if not most carefully watched, the most expensive. The Federal Government and the State governments have each an equipment of officials, with their long lists of salaries and perquisites. Our tax-payers have to bear the burdens of four governments—that is to say, the Federal, the State, the county, and the town or city. It behooves them to watch with the vigilance of interest and of patriotism combined, lest they lose their liberties and their estates together.

## ARMY BILL OF THE FORTY-FOURTH CONGRESS, AND THE PRESIDENT'S RELATIONS TO THE ARMY.

Two letters from Mr. Field to the "Albany Law Journal," September, 1877.

### THE ARMY BILL.

*To the Editor of the Albany Law Journal.*

SIR: The Forty-fourth Congress will always be memorable for two collisions between the two Houses, one in respect to the counting of the electoral votes and the other in respect to the bill for the support of the army. The two measures, though independent in their reasons, were, nevertheless, strangely related. On the first occasion, the Senate and the House stood directly at variance, regarding the votes of some of the States, but, having previously agreed to abide by the advice of an electoral commission, the views of the Senate prevailed, and the votes which it claimed were counted. On the second occasion, the Senate having insisted upon striking from the bill for the support of the army a provision, which the House had inserted, with the view of preventing an abuse of the service, already carried to the extent of falsifying the electoral votes of two, at least, of the States, the House maintained its position, and the result was, of course, the failure of the bill.

The provision which the House had inserted was the following:

"SECTION 5. That no part of the money appropriated by this act, nor any money heretofore appropriated, shall be applied to the pay, subsistence, or transportation of troops used, employed, or to be used or employed, in support of the claim of Francis T. Nicholls or S. B. Packard, to be Governor of the State of Louisiana. Nor shall any of said money be applied in support of the claim of the two bodies claiming to be the Legislature of said State, presided over, respectively, by L. A. Wiltz and Louis

Bush ; nor of the two bodies claiming to be the Legislature of said State, presided over, respectively, by C. O. Antoine and Michael Hahn ; nor in support of the claim of Thomas O. Manning and associates to be the Supreme Court of said State ; nor in support of the claim of John T. Ludeling and associates to be the Supreme Court of said State ; nor in aid of the execution of any process in the hands of the United States Marshal in said State issued in aid of and for the support of any such claims. Nor shall the army, or any portion of it, be used in support of the claims, or pretended claim or claims, of any State government, or officer thereof, in any State, until such government shall have been duly recognized by Congress. And any person offending against any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be imprisoned at hard labor for not less than five nor more than ten years."

Upon the objection of the Senate, three successive committees of conference were appointed, but all of them failed.

The responsibility for the failure was charged by the House upon the Senate, and by the Senate upon the House ; by the Democrats upon the Republicans, and by the Republicans upon the Democrats. Responsibility, however, is measured more by causes than by consequences, and in the present instance it must fall where the argument failed. If the army had been abused, and the clause proposed would have afforded a remedy, and was within the competency of Congress, the House was right ; if, on the other hand, Congress was not competent, the Senate was right. Nobody in either House, whatever may have been the private opinions of members, denied the existence of the abuse, or that the remedy proposed was direct and complete : the point, and the only point, pressed in debate, was the incompatibility of the remedy with the provisions of the Constitution. A few extracts from the speeches against the measure will make this evident.

In the Senate Mr. BLAINE said : " I have a very great desire that the army bill should pass, without any angry discussion, or without any introduction of the controverted points that lie just in that section. I have very decided views upon the subject, but I do not know that the expression of them would do any good. I can not believe that there is a lawyer on either side of this chamber who will assert in his place that he believes that the Congress of the United States has the right to say to the President, who, by the Constitution, is the Commander-in-

Chief of the army and navy, that in a particular exigency he shall not command the army, and in another exigency he shall command it in a certain way. If that does not constitute a clear invasion of the powers of the President, conferred upon him by the organic law of the land, then I can not read it. The Senator from Delaware must know and himself see that, with that provision in the bill, it would be simply impossible to get the army appropriation bill passed—”

Mr. BAYARD: “And yet the Senator understands that the power of Congress to regulate the use of the army is undoubted—”

Mr. BLAINE: “It is perfectly undoubted that the President of the United States must command the army, under the provisions of law, but that is a very different thing from saying that in a particular instance you shall command the army in this way, and in another particular instance you shall not command it in that way. I think the Senator from Delaware does not need to be reminded that there is a world-wide distinction just there, and one which I am very sure he would not cross.”

In the House Mr. BANKS said: “But there are some things which are not within the power of the two Houses of Congress, and among these is the command of the army. . . . ‘The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States.’ That is the language of the Constitution (section 2, Article II). Congress has power to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States (section 8, Article I). Undoubtedly it has the same power in regard to the regular Army of the United States; but its command is given to the President. It is the duty of the United States to ‘guarantee to every State in this Union a republican form of government,’ and ‘on application of the Legislature, or of the Executive when the Legislature can not be convened,’ to protect each of them against invasion and domestic violence. Whatever power is given in the Constitution for this purpose is given to Congress and the

President, but the command of the army is nevertheless in the President."

Mr. GARFIELD said: "But coming back to the constitutional question, the passage of this clause in the army bill is absolutely impossible. We can not, under any circumstances, consent to do what we know to be unconstitutional, and believe to be dishonorable."

Whether these eminent members of Congress, and representatives of their party, were of one mind in their reasons for the conclusion, or not, they all agreed in the conclusion itself, that the clause in controversy was an invasion of the constitutional rights of the President.

Such were the words uttered in debate. But, lest they be treated as unguarded utterances in the heat of the moment, let us turn to more deliberate ones since of the same gentlemen or their party supporters. Mr. Morton has repeated, on at least two occasions, that he thinks the measure of the House an unconstitutional interference with the President's prerogative. The late Republican Convention in Maine, in which Mr. Blaine took an active part, resolved as follows:

5. "The action of the Democratic House of Representatives in refusing appropriations for the army, except upon conditions that deprived the Commander-in-Chief of the discretion vested in him by the Constitution, was wholly unjustifiable, dangerous, and revolutionary, and it is a striking commentary on this evil and perilous course that two of the States, whose entire representation in Congress aided in defeating the army bill, have been since compelled, under the pressure and violence of mob law, to call on the national Government for such aid as only the army can render."

The "Penn Monthly," a journal of deserved reputation, takes a similar view. Indeed, I have yet to see the first line written, or to hear the first word spoken, by a Republican in favor of the provision, or against the action of the Senate.

Because of the failure of this bill, an extra session of Congress has been called, to be held in October. The question between the two Houses is, therefore, as imminent as it is important. Considered as a question of constitutional right, there is scarcely another of greater magnitude; considered as a practical question to be decided by the two Houses within a few



months, it is one of the most urgent of all questions before the country. Let us discuss it, if we can, with no thought of its effect upon parties, and solely as a question of liberty and constitutional law.

Once before, and once only, has there been a disagreement between the two Houses of Congress on a similar question. That occurred in 1856, when the troubles in Kansas were at their height. On that occasion the position of parties was reversed. The Republicans, having a majority in the House, inserted the following clause in the army appropriation bill :

“That no part of the military force of the United States, for the support of which appropriations are made by this act, shall be employed in aid of the enforcement of any enactment of the body claiming to be the Territorial Legislature of Kansas, until such enactment shall have been affirmed and approved by Congress; but this proviso shall not be so construed as to prevent the President from employing there an adequate military force, but it shall be his duty to employ such force to prevent the invasion of said Territory by armed bands of non-residents, or any other body of non-residents, acting or claiming to act as a *posse comitatus* of any officer in said Territory in the enforcement of any such enactments, and to protect the persons and property therein, and upon the national highways leading to said Territory, from all unlawful searches and seizures; and it shall be his further duty to take efficient measures to compel the return of, and withhold all arms of the United States distributed in, or to said Territory, in pursuance of any law of the United States authorizing the distribution of arms to the States and Territories.”

This was rejected by the Senate, and, the House not receding, the bill was lost. I have said that the question of 1856 was similar to that of 1877, but they were by no means identical. The Democrats had more reason for rejecting the proposed restriction in the first instance than the Republicans had in the last. Kansas was a Territory, while Louisiana is a State, and the authority of the Federal Government to control the Territories, in all things, is as clear as its want of authority to control the States in their State affairs. In the Kansas controversy Mr. Seward stated his position thus :

“The House of Representatives may, therefore, lawfully pass a bill prohibiting the employment of the Army of the United States in executing laws in Kansas which it does not approve, no matter by whom those laws were made. Since the House of Representatives has power to pass a bill

distinctly, it has power also to pass an equivalent prohibition in any bill which it has constitutional power to pass, and so it has a constitutional right to place the prohibition in the annual appropriation bill."

The precise question involved in the present controversy is, the power of Congress to prevent the use of the army to dispose of the title to State offices. The contention of the House, as stated in the general words of the section, was that the army should not "*be used in support of the claim or pretended claim or claims of any State government or officer thereof, in any State until such government shall have been duly recognized by Congress*"; while on the other side the contention of the Senate was that the section was an invasion of the constitutional rights of the President.

This position of the Senate involves one of two propositions: either that it is the constitutional right of the President, rather than Congress, to determine the rightful government of a State; or that it is his constitutional right to use the army in support of the claim of a State government or officer whose title Congress refuses to recognize. Both of these propositions, I venture to affirm, are not only unsupported by the Constitution, but plainly repugnant to it.

It will, I am confident, be found, upon examination, that the only authority which the President ever had to decide a question of title to any State office, was a mere incident to his authority to intervene for the protection of the State from domestic violence; and that his only authority for such intervention has been derived, not from the Constitution, but from an act of Congress, which, of course, Congress can continue or discontinue at its mere will and pleasure. What it gave it can assuredly take away. And I am equally confident that the only function of the President in respect to the army is to take command of such troops as Congress may choose to raise for any service which it deems proper, and, in the capacity of their first General, direct their military operations incident to such service. In the exercise of his function as General or General-in-Chief, he is subject, like any other general, to the law of the land. While Congress can not deprive him of his command, it can make laws which he must obey, and he must, in all things,

conform himself to such regulations as Congress may see fit to impose.

It should have been sufficient, for an answer to both the propositions involved in the claim of the Senate, to read the present Act of Congress, first enacted in part in 1792, repeated in 1795, enlarged in 1807, and now embodied in section 5297 of the Revised Statutes as follows :

"In case of an insurrection in any State, against the government thereof, it shall be lawful for the President, on application of the Legislature of such State, or of the Executive, when the Legislature can not be convened, to call forth such number of the militia of any other State or States, which may be applied for, as he deems sufficient to suppress such insurrection; or, on like application, to employ, for the same purposes, such part of the land or naval forces of the United States as he deems necessary."

It shall be *lawful*, says the act. Was it lawful before? If so, the enactment was senseless. The act assumes that it is the province of Congress to provide for the execution of the guarantees promised in the fourth section of the fourth article, and that Congress can control the President in the employment of the army. The proviso inserted by the House, in 1877, was but a partial repeal of this statute. But, inasmuch as, in strange forgetfulness of the past, the position of the Senate has been defended, upon the reasons stated by Senators, and party conventions, with the party press, have repeated the argument, if argument it may be called, it may serve a useful purpose to go more fully into the question.

If there be any political doctrine, which more than another is the corner-stone of our system of State and Federal Government, it is the complete independence of each in regard to the other. Congress can not even tax the salary of a State officer, for the reason that it can not interfere with the free movement of State machinery. Each government moves in its own independent orbit. There is one instance in which the Federal Government is recruited from the State governments, and that is in the choice of Federal Senators by State Legislatures. And there is another instance in which the Federal Government is authorized to interfere directly with the State governments, and that is under the fourth section of the fourth article. But

the Governor of a State is as much independent of a President as the President is independent of the Governor. When Washington, as first President, visited Massachusetts, Governor Hancock made it a point of etiquette that the President should call on him, as having the precedence in his own State, a point which he afterward yielded; but the incident shows that, in the days of the fathers, the Governor of a State, on his own ground, was considered rather as the equal than the subordinate of the President, who was, after all, "*primus inter pares*."

The one instance, and the only one, permitted by the Constitution, of direct interference with State governments or State officers, is that which I have just mentioned. These are the words of the Constitution: "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the Legislature or of the Executive (when the Legislature can not be convened), against domestic violence." This is the clause that is supposed to give the President the exclusive authority to decide between two claimants which of them is the rightful or actual officer of a State. Yet it gives the President no power whatever. It does not even mention him. It is not in that part of the Constitution which treats of the executive department. "The United States"—the nation—"shall guarantee" and "shall protect." From which department of the Government the guarantee and the protection are to come depends upon other considerations. The Constitution itself has not left the matter in doubt. Whenever a particular department is clothed with an authority, or charged with a duty, the language is explicit, the department is mentioned, and the authority or duty is specified. When no particular department is mentioned, the authority and the duty are devolved upon the Legislature, under that clause which gives Congress power to pass all laws necessary or proper for carrying into effect any of the powers vested in the Government of the United States.

This construction accords with the generally received theory of our government. Nobody has ever yet supposed, or, if he has foolishly supposed, has been rash enough to say, that the

President has exclusive authority, or any authority, to decide whether a State has a republican form of government, yet the language of the clause gives as much authority to guarantee a particular form of government as it does to protect against domestic violence.

In reality, no authority is anywhere given to any Federal officer to decide upon the title of any State officer, except as an incident and necessary preliminary to the exercise of some other power. The incident in such case depends upon the principal, and the validity or invalidity of the former is determined by the latter. When a body claiming to be the Legislature of a State, or a person claiming to be Governor, applies, under the fourth section of the fourth article, for the protection of the State against domestic violence, the Federal authority, to which the application is made, must, of necessity, decide or assume that such body is the Legislature, or such person the Governor. This necessity affects all Federal officers, from the highest to the lowest. If a general of the army is directed to aid the mayor of a city with his command, the General must find out who is mayor. Any citizen may be placed under a like necessity, of deciding whether one who assumes to hold an official position does really hold it; but that is not because it is the citizen's province to decide questions of title to office, but because he must assume a particular person to be the officer, in fact or law, before he obeys him. This assumption he adopts, of course, at his peril. So that the question, after all, is this: Which department of the Government decides and acts for the United States in guaranteeing republican governments to the States, or in protecting them against violence from abroad or at home? To this question there can be, it seems to me, but one answer; it is the legislative department, the Congress.

This is the natural construction of the language of the Constitution. The United States are to guarantee and the United States are to protect. The executive department is not charged with the duty; neither is the judicial department. The legislative department, however, has authority to pass all laws necessary for carrying into effect a power vested in the Government, and not specially intrusted to another department.

Not only does the text of the Constitution lead us, naturally, to this conclusion, but every recognized auxiliary of interpretation helps us to the same result, such as the theory of our government, the history of the Constitution, the acts of Congress in pursuance of it, and the decisions of the courts.

Neither the framers of the Constitution nor the people who accepted it could have dreamed of giving such a power to the President. Authorizing him, contrary to the will of Congress, to execute the fourth section of the fourth article would have been making him a virtual dictator. If, for example, he were to affirm that the Constitution of Massachusetts is not republican, and should undertake, for that reason, to displace the existing Legislature, or send a commission to Boston to organize a new one, would there be no remedy but forcible resistance?

The history of the clause is significant. The general plan of the Constitution was first brought forward in the Convention in a series of resolutions proposed by Mr. Randolph, on behalf of the delegates from Virginia. Those resolutions declared that the national Legislature "ought to be empowered to enjoy the legislative rights vested in the Congress by the Confederation, and, moreover, to legislate in all cases to which the separate States are incompetent," and, also, that "a republican government and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State." Mr. Charles Pinckney's plan enumerated among the powers to be granted to Congress, that "to subdue a rebellion in any State on application of its Legislature," and proposed the following as a separate article: "On the application of the Legislature of a State, the United States shall protect it against domestic violence." When the resolution in Mr. Randolph's plan came to be considered in Committee of the Whole, it was changed to the following, and so reported to the committee: "*Resolved*, That a republican Constitution, and its existing laws, ought to be guaranteed to each State of the United States." This was changed in the Convention to the following: "*Resolved*, That a republican form of government shall be guaranteed to each State, and that each State shall be

protected against foreign and domestic violence," and thus referred to the committee of detail to prepare and report a Constitution. This committee made a report, in which, among the powers of Congress, was that "to subdue a rebellion in any State, on the application of its Legislature," and there was a separate article as follows: "The United States shall guarantee to each State a republican form of government, and shall protect each State against foreign invasions, and, on application of its Legislature, against domestic violence." This was afterward changed by striking out the word "foreign," and inserting the words "or Executive" after Legislature, and so sent to the committee of revision, by which it was reported as it now stands in the Constitution, except that the words "when the Legislature can not be convened" were afterward inserted by the Convention. Mr. Randolph, however, though the general plan, first submitted by him, was the basis of the Constitution as adopted, refused to sign it, for several reasons, one of which was "the authority of the general Legislature to interpose on the application of the *Executives* of the States." It is clear from this history, that the Convention did not mean to commit the execution of the guarantee to any other authority than the United States in Congress assembled.

The legislative history of the United States follows and confirms this theory. The first act respecting insurrection in a State was passed in 1792, and that provided, in the first section, that whenever the United States should be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it should be *lawful* for the President to call forth "the militia," and, in the second section, that he might call out the militia of a State to suppress combinations therein too powerful to be suppressed by the ordinary course of judicial proceedings, provided the exigency was notified to the President by an associate justice or the district judge; and furthermore, in case the militia of such State refused, or were insufficient, he might resort to the militia of other States, "if the Legislature of the United States be not in session." This act was limited to two years and the end of the session next thereafter.

The second act was passed in 1795, authorizing the employment of the militia, and a third act, passed in 1807, authorized

the employment of the army and navy. These different provisions now stand in the Revised Statutes in section 5297, already quoted.

The enactment assumes, as I have pointed out, that the whole subject of protecting a State against domestic violence is within the competence of Congress, which alone can give authority to interfere, and can prescribe to that end the use of such means as it pleases. Thus the first act made it a condition, in a certain contingency, that there should be a precedent notification from a Judge of the United States, and in another contingency gave authority to act only in the recess of Congress, and was, moreover, limited in its duration to a short period. If the Congress of 1792 was competent to withhold the power from President Washington, after the experience of two years, surely the Congress of 1877 is competent to withhold it from any President, after the experience of the last eight years. The present act of Congress limits the authority of the President to the militia of States other than that where the insurrection takes place, upon the idea, no doubt, that the militia of that State are to be used by its own lawful authorities, and the act also requires the President to issue his proclamation to the insurgents at the same time that he uses the forces placed under his control.

The judicial history of the United States leads to the same conclusions. In the controversy growing out of the domestic troubles of Rhode Island, a case (*Luther vs. Borden*) was brought to the Supreme Court of the United States. The right of Federal interference in those troubles was thus brought in question, and the Court pronounced an opinion, of which the following are portions :

“The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to any State in this Union a republican form of government, and shall protect each of them against invasion, and on the application of the Legislature or of the Executive (when the Legislature can not be convened), against domestic violence.

“Under this article of the Constitution, it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it



can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority, and its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. . . .

"So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed in the power of a court to decide when the contingency had happened which required the Federal Government to interfere. But Congress thought otherwise, and no doubt wisely; and by the Act of February 28, 1795, provided that 'in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the Legislature of such State, or of the Executive (when the legislature can not be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection. . . .

"By this act the power of deciding whether the exigency had arisen upon which the Government of the United States is bound to interfere, is given to the President. He is to act upon the application of the Legislature or of the Executive, and consequently he must determine what body of men constitute the Legislature, and who is the Governor, before he can act. The fact that both parties claim the right to the government can not alter the case, for both can not be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the Act of Congress."

And, lastly, the same doctrine is now conceded by the present Republican executive department. In a speech delivered before an Ohio audience, within a month, by Mr. Sherman, the Secretary of the Treasury, he takes occasion to say that "the President is not made the judge of who is elected Governor of a State; an attempt to exercise such power would be a plain act of usurpation." And in an article put forth with great parade under the title of "The President's Southern Policy," and published in the present number of the "International Review," if not in the name, yet with the evident sanction of President Hayes, it is declared that "it is to Congress, and not to the President of the United States, that each and all of the oblige-

tions defined and declared by the fourth section of Article IV of the Constitution are in the first instance addressed, the conduct of the Executive being controlled at every step by the necessity for Federal legislation, with respect to the exigencies to be met, the means to be employed, the method of procedure, and therefore confined and limited solely to the execution of the laws pertaining to the subject. In other words, here, as elsewhere, and under all circumstances, the duty of the President of the United States is simply to 'take care that the laws are faithfully executed.' His only sanction for participating at all in the discharge of these constitutional obligations being found in the fact that Congress has enacted in advance the requisite legislation in furtherance of their faithful fulfillment, the Act of 1795, with such enlargement as its provisions have since received, being the warrant to-day for whatever of executive action the President may direct for this purpose."

We have thus all the great departments of the Federal Government, the legislative, judicial, and executive, agreeing that the execution of the guarantees mentioned in the fourth section of the fourth article is, by the Constitution, devolved upon Congress.

I have dwelt thus long upon the question of the President's right to determine who are and who are not the rightful or actual officers of a State, not because there is any inherent difficulty in the question, but because the answer really disposes of the point at issue between the Senate and the House.

Before I pass from the subject, however, I must call attention to an observation of Mr. Sherman in his Ohio speech that appears to me inconsistent with his declaration just quoted. He had hardly finished declaring that an attempt of the President to exercise the power of judging who is elected Governor of a State would be a plain act of usurpation, when he took pains to say that, if he had been President instead of Grant, he would have "*recognized*" Packard as Governor of Louisiana, "and sustained him with the full power of the General Government." What is the difference in practice between "recognize" and "decide"? Who decided in favor of Packard as Governor, that Grant or Sherman should recognize him? Was

Packard in possession of the office any more than Nichols? The power to recognize is the power to decide; and the Supreme Court appears to be of that opinion, according to the passage which has just been quoted. Give any person the right of recognizing whom he will to be Governor and of following up the recognition with the army, and he need not care who may undertake the decision. Whenever there are two claimants of the same office, each of course will seek to fortify his claim by evidence of title and by the decision of some authority in his favor; the power to determine which has the better decision is in no degree different from the power to decide, for all practical purposes, where lies the title. Does not every schoolboy, who has intelligence enough to read the shameful history of the last eight years' misrule in South Carolina, Florida, and Louisiana, know full well that, during all these years, Grant's heavy sword has been the only effective title to office in those trampled States?

If there be, then, really no authority but an Act of Congress for the President's interference with the questions, which is the lawful government, and who are the lawful Governors of a State, can there be any doubt that the intervention of the army in these questions, against the will of Congress, would be a plain usurpation? If the Acts of 1795 and 1807, now reenacted in the Revised Statutes, were repealed, the power to protect the lawful Governors or government would be withdrawn from the President and remitted to Congress. In that case it could not possibly be constitutional for the President to support with the army a person whom Congress had declared not to be Governor. It could not be lawful for him to use the national forces in aid of a usurper. The President could not oppose, with an armed body, the execution of a decision of Congress, any more than he could order out the troops to resist the execution of a judgment of the Supreme Court. The Constitution is not a patchwork of contradictions. Its different parts were not left thus to counteract each other.

It can not be necessary to pursue the argument further, in order to show that the claim of the Senate, in its present controversy with the House, is untenable. The Act of 1795 was probably never intended to apply to the case of a disputed

State government, or to make the President arbiter between contending parties, each claiming to have elected its candidates to established offices; but, inasmuch as it has been so interpreted, it is time for Congress to interpose, and take to itself a power so liable to abuse and so grievously abused.

Although the discussion of the question between the Senate and the House does not necessarily involve a consideration of the general relations of the President to the army, yet it leads naturally to it. And, with your leave, I will discuss that subject in another letter.

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## THE PRESIDENT'S RELATIONS TO THE ARMY.

*To the Editor of the Albany Law Journal.*

SIR: In my letter upon the army bill, where I was led to consider the question, whether the execution of the guarantees promised in the fourth section of the fourth article of the Federal Constitution was devolved upon Congress or the President, I mentioned that the subject led so naturally to a discussion of the general relations of the President to the army, that I was tempted to pursue it. This I will endeavor to do in the present letter.

The President, according to the Constitution, is "Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States." What does the expression "Commander-in-Chief" mean? What would it mean if it stood alone, and what does it mean when used in connection with the other parts of the Constitution? That question is to be answered first, out of the text of the instrument itself, next out of the political theories prevalent when it was framed, and lastly out of the subsequent history of the Government.

Does it result from the President's being Commander-in-Chief that it is his right, as part of his executive function, conferred by the Constitution, and not limitable by Congress, to

employ the army in his discretion, at such places and for such purposes as he may think proper, notwithstanding an Act of Congress passed by the two Houses with his approval, or by two thirds of each House against his dissent, enacting that the army shall not be employed at a particular place, or in a particular manner, or for a particular purpose? Though Congress is empowered by the Constitution to declare war, raise and support armies, and provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, yet when the armies are once raised, the money provided, and the militia called forth, can Congress prescribe their employment in respect to time, place, or circumstance, or in any respect whatever? If Congress raise an army for service against the Indians, may the President refuse to employ it in the Indian country, and march it straight-way to the seaboard? Or, when a bill was brought into the House of Representatives last winter, requiring the troops at Washington to be removed to a certain distance from the Capitol, where the two Houses were sitting, and were about to count the electoral votes, and a score of Republican voices cried out that it was an unconstitutional interference with the President's prerogative, did those voices utter the truth, or not? Could the President then have brought the troops to surround the Capitol, or even to enter it, against the will of Congress?

Looking at the text of the Constitution, let us first read the expression "Commander-in-Chief," as if it stood alone, and then read it in connection with other parts of the instrument. Hamilton, in the "Federalist," answering the objection urged against the Constitution, that it made the President Commander-in-Chief, said that it made him only the "first general and admiral of the confederacy." Yet now, after the lapse of more than eighty years, in the fervor of partisan harangue, it is claimed that because the President is Commander-in-Chief of the army and navy, and militia when taken into the Federal service, this army, navy, and militia, of which he is only the chief captain, can be moved by him wherever he pleases, and be used as his judgment or his will inclines. But, if a seaman were employed to command a ship upon an engage-

ment to be kept in service as commander for four years, would any one thence infer that he had an irrevocable power to sail the ship into whatever seas he pleased, and traffic in such ports as he happened to prefer? Why the word "commander" should have a different meaning when applied to an army, and when applied to a ship, it would be hard to tell.

The Governor of New York is declared by its Constitution to be "Commander-in-Chief of the military and naval forces of the State." Is he too clothed with the power of using the armed forces of New York for such service as he pleases? Are all the laws of the State, which regulate the employment of the militia, so many encroachments on the Governor's constitutional prerogative?

To command an army is to give it its orders; but that means only that whatever orders are given must come through the commander, not that he may give any order he pleases. All orders to our army are to be issued by the President or his subordinates. To do what? That, and that only, which the laws allow; and the laws are made, not by him, but by Congress. His function is executive. The laws must of course be such as the Legislature is, by the Constitution, authorized to enact; but the power to make them can not, in the nature of things, be subject to the power to command the troops, for that would make the latter the superior of the two; in other words, would render the military superior to the civil power, a conclusion, the absurdity of which in this country demonstrates the folly of the premises.

If there were nothing else in the Constitution than these two provisions—one that Congress should make the laws, and the other that the President should command the army—could there be any doubt in the minds of reasonable men that the latter, in his military office, would be bound by the laws which the former should pass? This result would follow from the nature of the two functions, one being legislative and the other executive. It could not be otherwise in any country, unless the two functions were united, as in Russia, in one person. There the Emperor, who commands the army, makes also the laws, and in the use of his army he need respect only his own supreme will. But where the two functions are disunited, as

in this country, the Legislature must, in the nature of things, control the Executive.

Why is it that the President can not order a platoon to enter a man's house, or take possession of his land? Because the act would be contrary to law. The same legislative authority which makes that act unlawful, can make any other act unlawful within the scope of the law-making power.

The President, as Commander-in-Chief, is an executive officer only. He executes the Federal laws. His function as commander gives him no power to command, but in obedience to the laws. In other words, to be Commander-in-Chief of the Army, is to be the organ or instrument by which the army is moved to its legitimate service. And what is, or is not legitimate service, depends upon the lawgiver, and him alone.

What is the real significance of the political axiom so often declared in constitutions, and so much used in political discussions, that the military must ever be subordinate to the civil power? It is this: the supreme power of the State is the civil power, and the military is its arm. This arm is moved in this or that direction, and for this or that service, as the civil power, the head, ordains.

It should seem, therefore, that the appointment of the President to be Commander-in-Chief, does not, of itself, give him the right to move the troops wherever he will, and employ them in such service as he may choose.

But even if the office of commander-in-chief, standing by itself, might be said, with any show of plausibility, to make the army and navy instruments of his will, the other parts of the Constitution limit and define, in explicit terms, the relative rights of the President and Congress over the national forces.

Congress is expressly authorized to "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water," to "raise and support armies," to "provide and maintain a navy," to "make rules for the government and regulation of the land and naval forces," to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," and to "provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in

the service of the United States." It is certain, therefore, that the President can not use the army, in any act of war, until Congress has made declaration of the war. It is certain, also, that it belongs to Congress and not to the President to authorize the calling out of the militia to suppress an insurrection, and without such authority the President can not call them, and when called they must be governed by authority of Congress, and not of the President. It is equally certain that it belongs to Congress and not to the President to "make rules for the government and regulation of the land and naval forces." Does not this place the ultimate control of the land and naval forces in the hands of Congress? To *regulate commerce* has been held to include the absolute control of all intercourse, and, under this single power, all traffic and all interchange between the States themselves and between the nation and other nations are placed under the authority of Congress. Congress is to govern and regulate all the Federal forces, the only limitation being that the instrument, by which the government and regulation are to be effected, is the President. He is to execute the will of Congress in that particular, just as he is to execute the other laws that Congress may enact. And, last of all, it is Congress and not the President that is to "raise and support armies," and to "provide and maintain a navy." What is an army? An embodied and armed force. Surely the power which is authorized to raise it is also authorized to declare the purposes for which it is raised. The power to raise and support is unlimited. The greater includes the less. Troops may be raised for a general service or for a particular service, and if Congress may direct them to be used for a particular service it may direct them not to be used for that service. For example, if Congress should withdraw the general delegation of power heretofore given to the President and decide for itself when and how to interfere for the protection of a State against domestic violence, it might in case of domestic conflict resolve that a particular government was the lawful one, and raise troops for the specific purpose of sustaining it; or if Congress should prefer to leave the general delegation on the statute-book, reserving to itself the sole right of interfering whenever there was a dispute as to the rightful government, it



might simply forbid, as in the instance of the last army bill, the use of the national forces on either side, until Congress itself had exercised its own judgment of the exigency.

The President is Commander-in-Chief of the navy as well as the army. That construction of the Constitution which would hold him beyond the control of Congress as to the disposition of soldiers, would hold him beyond the control of Congress as to the disposition of ships. If, therefore, a statute should authorize the building of a particular class of ships for a particular service, and that alone, the President might disregard the limitation, according to this new school of constitutional law. For example, if the construction of half a dozen monitors should be ordered in the next navy appropriation bill, to be kept always in the harbor of New York, the President might send them all, as soon as ready, to Washington, and if interrogated by Congress on the subject, might answer that it belonged to them to provide and maintain a navy, but to him to use it as he judged best.

The practice of the legislative and executive departments has never yet accorded with any such notion of Presidential power, as in the present controversy has been asserted. The statutes of the United States are full of instances in which the disposition of troops has been prescribed by Congress. I will mention only a few of them. Section 5298 of the Revised Statutes authorizes the President to use the army, navy, and militia to enforce the laws of the United States, and section 3298 requires him to perform certain conditions to such use of them.

Section 2002 is as follows: "No military or naval officer, or other person engaged in the civil, military, or naval service of the United States, shall order, bring, keep, or have under his authority or control any troops or armed men, at the place where any general or special election is held in any State, unless it be necessary to repel the armed enemies of the United States, or to keep the peace at the polls"; and section 5528 makes a violation of section 2002 punishable by fine or imprisonment at hard labor, and 5532 adds disqualification to hold any Federal office. Sections 5287 and 5288 authorize the President to use the army, navy, and militia to enforce neu-

trality. Section 5316 authorizes him to use the same for the enforcement of the revenue laws. Sections 1984 and 1989 authorize him to use them to enforce civil rights.

The extraordinary notion that the President has exclusive control over the use of the army has been in part produced by a vague impression of resemblance between his constitutional prerogative and that of sovereigns under constitutional governments. This impression is begotten partly of pride, partly of fear, and greatly of ignorance. There are some people who take such pride in everything American that they must needs consider their own chief magistrate as mightier than a king. It is not an uncommon thing to hear one of these foolish persons boast that their President has more power than the Queen of England, nay, that he is the greatest magistrate in the world. A false analogy here ministers to pride. Because the President is chief magistrate it is inferred that he is like other chief magistrates, and as these are in general kings, it does not require a great stretch of the imagination to fancy that he also is a sort of king. But an American President is not a king, nor anything like a king, any more than he is like the Emperor of Russia, the Sultan of Turkey, or the Mikado of Japan. It is true that he sends and receives envoys, and when sovereigns address him, they call him, in the language of diplomacy, their "great and good brother," but that no more makes him like one of them than the Indians calling him their great father makes him loving and paternal. The chief magistracy is not of necessity a kingly office. The first officer of Switzerland has not the trace of a king about him. The Governors of our States are chief magistrates also, but they are not little kings. If we would know how nearly the President resembles a sovereign in his attributes, we should compare these attributes with those of the Queen of England. The people of England are the subjects of Victoria, the people of the United States are not the subjects of President Hayes; the Queen holds her office for life, and, departing, transmits it to her heirs; the President holds his office for four years, and has no personal relation with his successors; the Queen declares war, the President can not; the Queen bestows honors and titles, the President does not; the Queen is irremovable, the President is removable; the Queen

is not amenable to the laws, the President is; the Queen appoints all officers in her dominions, the President appoints none, without the permission of the Senate or of Congress; the Queen makes all treaties of her own authority, the President can not make one, without the consent of two thirds of the Senate. Scarce an attribute or a distinction, substantial or ceremonial, can be mentioned in which the President of the United States does not fall short of the Sovereign of England. There is indeed a view of the two offices flattering to our national pride. The President is or should be chosen by the free suffrages of his countrymen, the largest constituency in the world; his crown is the respect which they bear him, and his glory the simple dignity of the greatest republican office in the world. Washington, sitting in the Presidential seat, was a more commanding figure than any sovereign on the throne.

But what, after all, are the relations of the army and militia of England to the Crown of England? During the struggle between Charles I and the Parliament, each strove to gain possession of the military forces of the kingdom. We all know how the struggle ended, and we also know how, after the struggle was over, the monarchy came to be restored. Hallam, commenting in his "Constitutional History" on the attitude of the Parliament to the new King, makes these observations:

"There was undoubtedly one very important matter of past controversy, which they may seem to have avoided, the power over the militia. They silently gave up that momentous question. Yet it was become, in a practical sense, incomparably more important that the representatives of the Commons should retain a control over the land-forces of the nation, than it had been at the commencement of the controversy. War and usurpation had sown the dragon's teeth in our fields, and, instead of the peaceable trained bands of former ages, the citizen soldiers who could not be marched beyond their counties, we had a veteran army accustomed to tread upon the civil authority at the bidding of their superiors, and used alike to govern and obey. It seemed prodigiously dangerous to give up this weapon into the hands of our new sovereign. The experience of other countries, as well as our own, demonstrated that public liberty could never be secured, if a large standing army should be kept on foot, or any standing army without consent of Parliament. But this salutary restriction the Parliament did not think fit to propose, and in this respect I certainly consider them as having stopped short of adequate security."

The slavish Parliament, which brought in the King, anxious to make a parade of their submission, passed "an act for ordering the forces in the several counties of this kingdom," with this magniloquent preamble: "For as much as within all his Majesty's realms and dominions, the sole and supreme power, government, command, and disposition of the militia, and of all forces by sea and land, and of all forts and places of strength is, and by the laws of England ever was, the undoubted right of his Majesty, and his royal predecessors, Kings and Queens of England, and that both, or either of the Houses of Parliament can not, nor ought to pretend to the same; nor can, nor lawfully may raise, or levy any war, offensive or defensive, against his Majesty, his heirs or lawful successors." But, notwithstanding the preamble, they proceeded to qualify this apparently unqualified power by enacting:

1. That the King might issue commissions of lieutenancy to persons to call together "all such persons, at such times, and to arm and array them in such manner as is hereinafter expressed and declared, and to form them into companies, troops, and regiments, and in case of insurrection, rebellion, or invasion, them to lead, conduct, and employ, or cause to be led, conducted, or employed, as well within the said several counties, cities, and places, for which they shall be commissioned respectively, as also into any other, the counties and places aforesaid, for suppressing all such insurrections and rebellions, and repelling of invasions, as may happen to be, according as they shall from time to time receive directions from his Majesty," with various other directions about providing horses, arms, and munitions.

The Bill of Rights, enacted in the beginning of the reign of William and Mary, declared "that the raising or keeping a standing army within the kingdom, in time of peace, unless it be with the consent of Parliament, is against law." In pursuance of the policy thus declared, the mutiny act, in which provision is made for the raising of troops, is passed every year. By an act of 8 George II (chapter xxx), it was provided that the Secretary at War should send orders for the removal of all troops two miles or more from the places of election of members of Parliament. The penalty for disobedience was dis-

missal from the service, and disqualification to hold any office, military or civil. Parliament thus determined what orders the Crown and the Crown's Ministers should give for the disposition of troops.

An act of George III (chapter cvii, § 95) enacted that the King might call out the militia, the occasion being first communicated to Parliament if sitting, or, if not sitting, declared in council, and notified by proclamation, the Parliament to be immediately called together. This act provided that the militia should not be sent out of the kingdom.

The act of 22 and 23 Victoria, chapter xxvii, declared, "It shall be lawful for her Majesty to enlist, and have in pay, and maintain out of the said revenues, in the United Kingdom of Great Britain and Ireland and the British Isles, any number of non-commissioned officers and private men belonging to the said Indian army, not exceeding, at any one time, six thousand." And all this was done in a country where, according to the preamble of the act of Charles, the sole and supreme command and disposition of all forces by sea and land, and of all fortified places, was vested in the Crown.

I venture the opinion that if, on the passing of the annual mutiny act, a clause were moved that the troops should not be employed in a particular service or stationed at a particular place, and a member of Parliament were to object that such a clause would be an infringement of the Queen's prerogative, he would be laughed at for his pains. Be that as it may, it is certain that, from whatever side we view the question, the authority of Congress to raise and support armies, for such service, and such service only, as it judges expedient, can not be reasonably questioned.

It is not a pleasing reflection that a question so free from doubt should be, nevertheless, debated with partisan vehemence, and that opinions upon it should be divided very much according to the dividing line of parties. We boast that ours is a government of opinion, but opinion to be valuable must be deliberate, collected from the whole public, and founded on fact. Those gusts of passionate thought, miscalled opinion, which sometimes sweep over a country, are not safe guides for governments. A constitution is the embodiment of public

opinion, matured by the thought and experience of many generations, and should always prevail over that momentary opinion, which comes and goes like an exhalation, and springs more from caprice than from judgment. When the opinions of a party or of a community run for the moment counter to the commandments of the Constitution, a statesman should remember that, however clamorous may be the voices of his party or his time, he may safely reason from the experience of the past, and appeal from the present to the future.

The great maxims of free government are the fruit, not of one generation or of one century, but of many generations and many centuries: they have been fought for and suffered for; they have been established and consecrated by blood and fire. If we would preserve them and profit by them we must remember them, teach them, and stand by them. It is an accepted article of the political creed of every free country that the military is and must be subject to the civil power. Whoever teaches that any military officer, from the highest to the lowest, from the Commander-in-Chief to the sergeant of a guard, can lawfully command his soldiers to enter any place or do any act which the law-making power of his country forbids, should be accounted, as he is in fact, the enemy at once of his country and his race.

If it were true that, when an army is once raised, the President can use it as he will, without other check than his liability to impeachment, then indeed it were better that an army should never be raised again. But it is not true. The people of this country have not been left in that unhappy dilemma. They can have an army, a small one it should ever be, but an army nevertheless, and their Congress can make laws for its government and employment which their President must obey.

## MUNICIPAL OFFICERS.

Address to the Young Men's Democratic Club of New York, March 13, 1879.

**GENTLEMEN:** The text of this discussion is the "City Record" of January 31, 1879, purporting to contain a list of the "officers and subordinates in the departments of the city and county government, with their salaries and residences, together with the judges, clerks, and attendants of the several courts held therein." It here appears that the amount paid in 1878 for services in the Police Department was \$3,315,948; in the Fire Department, \$1,023,557.10; Public Works, \$513,100.50; Public Parks, \$310,711.40; Docks, \$208,191.42; Finances, \$235,894.60; Charities and Corrections, \$310,782; Taxes and Assessments, \$109,000; Health, \$104,056; Law, \$101,359; Legislative, \$107,000; Executive, \$37,200; Building, \$64,392; Excise, \$60,425; District Attorney's office, \$68,311.20; County Clerk's office, \$40,725; Coroner's office, \$20,500; for other miscellaneous services, \$40,000; and for the courts, \$1,069,000. This is exclusive of fees paid to the sheriff, register, and city marshals. The sum paid for salaries in the Department of Education is not included in the list. Taking as a guide the sum paid in 1877, we may infer that the payment for salaries in 1878 was about \$2,800,000, and that the whole cost of the department was about \$3,500,000. These figures would make the total amount paid in this city and county, for official services in 1878, to be \$10,540,153.22, or in round numbers ten millions and a half.

You will have observed that this list embraces only the city and county officers, and the State Judges sitting in New York. The other State officers are not mentioned, nor the Federal officers. It is computed that there are a hundred thousand Federal officials in the country. Taking our whole population to be 45,000,000, and that of New York as one ninth, the proportion of Federal office-holders in this State would be eleven thousand, of whom at least seven thousand must be in this city. The State

has perhaps a thousand officials here, and the city from eight to ten thousand. The total number of persons now drawing pay from the public Treasuries, Federal, State, and municipal, or from the people in the shape of fees, may be roughly estimated at seventeen thousand, exclusive of notaries, referees, and commissioners, whose numbers can only be guessed at, but they may be at least three thousand. These figures give a total of twenty thousand persons, in the city of New York, occupying official positions and receiving official compensation, or about one in every fifty persons, counting men, women, and children.

This is the present outcome of our institutions and our civilization. It is the price we pay for government. What do we get for it? Do we get good government? We know that we do not. Let us examine particularly the several departments, legislative, judicial, and executive.

The legislative department of the city consists of twenty-two aldermen, who are paid \$89,000. Their work certainly is not well done. The judicial department consists of more persons for the population, and is paid more in the aggregate, than the corresponding service in England or France, the two countries with which we are most ready to compare ourselves. The highest English judges receive larger salaries than are paid in this country, but inferior judges less; and the aggregate of all, high and low, is less. What do we get for what we pay? Go into one of our courts in the morning, and you will probably see the Judge taking his seat a quarter or half hour after the time fixed, keeping counsel, suitors, and jurors waiting, and wasting time as valuable as his own; and when he takes his seat you will see cases postponed oftener than tried, or tried long after, and sometimes a year or two after, they were ready. And I may add that, when tried and appealed, they are nearly half the time sent back for retrial.

Coming to the executive department, we find a police under which beggars infest the streets; which is required to clean these streets, and does not clean them; under which a grave can be despoiled in a churchyard on a frequented corner, and a bank-vault robbed in broad daylight; a Department of Public Works, which, without any fault of its head, leaves the streets



scandalously paved ; a Department of Building, under which an expert declares that we "build to burn" ; and a Department of Charities and Corrections, which has in charge eleven thousand persons, criminal and dependent, whom it cares for in such a manner as to make the State Charities Aid Association call the place a "municipality of misery."

It is not, however, so much the manner in which the service is performed, as the compensation for it, that I am to discuss. Assuming that all the work required is done, and well done, it may still cost too much, and that is now the question. The following appear to me to be good rules for determining the just compensation for official service :

1. The best men should be employed.
2. Enough of them only should be employed to do the work.
3. They should have definite terms of service.
4. They should have a fixed compensation.
5. They should receive no fees.
6. They should receive only such compensation as they could get in other employment.

The best men, everybody will admit, should be employed. But how are we to get them? As a rule, they are not employed. The public service is mainly in the hands of an inferior class of men. Lament it as we may, it is idle to deny the fact. There are exceptions, no doubt, and many of them. In all departments there are men of a high order, and some of the highest order, of qualities, intellectual and moral. That, however, is not the common course ; the average is mediocrity—an obtrusive, noisy mediocrity—which gets into office and holds it partly by chance and partly by subserviency, partly by corruption and all by the machinery of political caucuses and conventions. Conceal it or try to conceal it from ourselves or from others as we choose, we are governed by an office-holding class, which by low arts controls the primaries, and these control conventions, and the people blindly vote as the conventions tell them. Until this system is changed, we can not have the best men ; and the system will never be changed so long as we submit to the dictation of primaries and conventions : but it can and will be changed when the people see fit to reform those bodies, or refuse to be governed by them.

The next rule is to employ only so many men as are necessary to do the work. Not long ago I asked the head of a department, one of the best managed in the city, whether, if he were managing it as he would manage his private affairs, he could not get along with two thirds the force he had. After reflecting a moment, he answered that he could. And why should not his department be managed as he would manage his private affairs? Should he not serve the public whose officer he is, as faithfully as he would serve himself? Of course, only one answer can be given to this question. If one third of the officers now living upon the public were dismissed, as they should be—for they can be spared—the city would save in salaries and wages more than three millions a year, supposing the same rate of compensation that now exists were to be maintained.

But it should not be maintained. The city should as a rule pay to its servants only what the same men could obtain in other employments. I will explain more fully hereafter.

A third rule is, to give to all the servants of the city definite terms of service, so far as possible. This rule would tend to reduce the rate of compensation, because men will work for less if they can be sure of a durable service; and would also tend to make the men more attentive to their duties, because relieved of anxiety as to what is to come.

A fixed rate of compensation is inconsistent with fees. The system of compensation in this mode is injurious to the service and to the public, in several particulars. One is the temptation it holds out to exorbitant and oppressive charges. The officer and the citizen do not meet here on equal terms. The latter must have the service; the former will not perform it without the fee; and there is no judge between them at hand. Submission is the only alternative. The habit of enforcing a fee begets a lax interpretation of the right, and this leads, imperceptibly perhaps, to unlawful demands. The officer who is paid by fees is both claimant and judge, a position the most unfriendly to justice, the most tempting to the officer, and the most unjust to the citizen. This is not the only evil, for the practice of fee-taking leads to the invention of contrivances for increasing them by increasing the services.

It is objected, however, that there are certain officers which, for special reasons, should be remunerated by fees, as for example the sheriff, for, so runs the pretense, his liabilities are great, and the country is not responsible for them. What reason is this? The sheriff assumes the office of his own free-will. If the salary, when balanced against the liability, does not offer a sufficient inducement to accept the place, he has only to refrain. There can be no doubt that good men can be found sufficient for the due execution of the office. The officer has it in his power always to require indemnity before acting in doubtful cases. His liability may last a great while, no doubt; so may the liability of the collector of the port, but that is no reason, in the opinion of Congress, why the collector should not be compensated as now by a salary, instead of fees as formerly.

But would you have the sheriff's, or clerk's, or register's services performed for private parties without requiring these parties to pay for them? Perhaps not, but I would require the sums paid to be transferred to the Treasury. How will you make sure that the sums are truly accounted for? The question implies a distrust of official honesty which is, perhaps, justified by the frequent breaches of trust. Dishonesty, however, is not universal, nor do I think that it is general. Whatever there is of it can be provided against. I suggest a series of stamps. For example, a stamp might be required on every summons for the commencement of an action, and on every execution or other process, and on every deed left for record, and on every requisition for a search.

The last of the rules with which I started requires that such compensation shall be given to the person employed as he would have obtained in other employments. As a general rule, this would be just to him and just to the public. I say as a general rule, for there may be exceptional cases, as when one has been taken into a public office, and has special qualifications, which there was no room to exercise in his previous employment. I can imagine such a case, however unfrequently it may occur. A person may possibly have such a peculiar aptitude for a special work that his services may be invaluable, while, at the same time, he may be unfitted for another employment, and, of course, unable to obtain other compensation;

but as a general rule I think the one I have given is the true one. Public officers are but agents and trustees of the public, and have no right, moral or legal, to give more for public service than they would have given for the like service for themselves. And those who enter public employment must know that, when they receive more than an equivalent for their services, they become participants in public robbery. The temptations to get into the service are great enough, without adding to them the inducement of better pay than can be got elsewhere.

The government should take from the people only what is necessary for its support. Then giving a person employed more than he could get in other employments produces an unjust competition with these employments; and giving more than can be obtained elsewhere creates a pressure upon those who have the offices to fill to force into them more persons than are necessary to the service.

There is a constant struggle to make the government do something which an individual would not do for himself in like circumstances, as, for example, to make it pay more for the same work, or the same price for less work.

A great deal is said about the eight-hour rule. It would, indeed, be well if men could support themselves on eight hours' work. I wish every man could do it. I wish I was not obliged to work more than that number of hours myself. In a society brought up to the ideal standard, I believe that less than this would be sufficient for all necessary labor. But we are not living in such a society; ours is one of diversified employments, differing in their productions, in which each person is free to engage as he pleases. It is inevitable that some should gain more than others, and hence inequality begins the moment all begin work. Every man competes with some other man; every laborer with another laborer. In this competition time is an element, as well as strength and skill; and, when the latter are equal, time wins. He who rises earlier than his competitor, and works more hours within the limits of healthful endurance, will carry off the prize. This would be the result in every community where labor is free. A law which prohibits a laborer from working more than eight hours a day is an infringement upon his freedom; and so, a law which com-

mands the employer to pay the price of ten hours' work for eight is an infringement upon his freedom also. The consequence is that men in their private transactions must be left to regulate for themselves the time as well as the price of service. The Government stands and must stand in this respect on the footing of an individual; otherwise, it violates the fundamental rule by paying its servants more than they could get in other employments.

It is assumed that workingmen want such a discrimination against the government, and politicians therefore think that they will commend themselves to the people by promoting it. But, if the workingmen would reflect that every dollar that the government pays more than an individual would pay, is so much unnecessary expense, the burden of which falls on workingmen not less than on others, they would be slow to ask for or even tolerate the discrimination. Every public expense is borne at last by the consumer, so that the workingman who demands the price of ten hours' for eight hours' work would in fact make the government pay one fifth more for his labor than an individual would pay, and this fifth must fall on the shoulders of his fellow-workingmen in proportion to their numbers. The man who lives in the poorest tenement-house, barely able to pay the rent, and feed and clothe his children, pays in fact a share of every excessive salary, and of all other unnecessary expenses of government.

My reason for touching upon this question is, that it is intimately connected with the larger question we are discussing, and involves the true theory of government. Every dollar paid by the government of the city, State, or nation, comes out of our pockets directly or indirectly. No man can escape the payment who hires a house or a room, or wears a coat, or eats a meal. It is not the landlord, it is not the rich man, that pays the taxes in the long-run, but he who eats, drinks, wears clothes, or finds shelter. All the citizens, then, rich and poor alike, have an interest in reducing the public burdens to the lowest practicable limit. It is forgetfulness of these rules which has led to so much wasteful expenditure. For the sake of catching soldiers' votes, the last Congress voted away millions, and some say a hundred millions, to pay what it did not owe; but it forgot

that every dollar paid was levied in part upon the poorest man in the land. No wonder that municipalities and administrative officers are spendthrifts, after the examples set before them!

In political science there are two schools: one, which teaches that the State should do the least possible; and the other, that it should do the most. This club, no doubt, belongs to the former, and with reason, as I think. The province of the State is to protect rights, or, as it has been sometimes expressed, to keep the peace. We hold, as self-evident truths, that men have unalienable rights to life, liberty, and the pursuit of happiness, and that "to secure these rights governments are instituted among men." To spend money, to extract it from the people, that it may be spent for other objects, is as contrary to the principle we profess as it is ruinous in consequences.

It is not the business of government to take care of the people. The people must and will take care of themselves. This is the law of nature, which is the law of God. Suppose the government were to undertake to furnish this city with provisions; to procure from land and sea and distribute the meats, fish, vegetables—what sort of a purveyor would it make? The provisioning of an army is one of the hardest tasks of military administration. What sane man would undertake to furnish this city with its food for a month? And yet the natural laws which govern our instincts and appetites bring to our door all the necessities of life month by month and year by year.

It is not my purpose to go further into details of salaries or wages. I limit myself to the rules according to which these details should be arranged. Whether the price paid to this person or to that is excessive, I will not undertake further to inquire. It may be instructive, however, to compare the cost of the police of London and Paris with that of New York.

The pay of a London policeman is about twenty-four shillings a week; and the police of Paris, consisting of a force of 7,756 agents, including 6,800 common policemen, costs 12,168,850 francs (about \$2,433,770), exclusive of equipments, and an indemnity of 185 francs to each policeman for lodging. Whether these figures furnish any guide here I will not undertake to say. It is enough to say that every rule that I have sought to prove is violated here.

We do not employ the best men; we employ more men than are necessary to do the work required; we employ many of them for uncertain terms of service, and at unfixed rates of compensation; we have a system of fees for the most coveted places; and we give a higher compensation in a great many instances than the persons compensated could obtain in other employments. And yet reform is not difficult if the will be not lacking; or rather, I should say, if we could have the concerted will of a few disinterested persons, the reform might be secured. It certainly is for the interest of the whole community that it should be brought about, and I am confident that a majority may be made to think so. When there is once an agreement in opinion upon that point, there will not be much difficulty in finding a way to convert the opinion into action; for we know that where there is a will there is a way.

I will venture to indicate one of the ways. Fix the limit of expenditure in every department or subdivision of a department, and tell the officers in charge that if they do not perform the service—and by performing I mean well performing—they must give way to others. For example, I would set apart a sum sufficient, in the judgment of the best experts, for cleaning the streets, and I would then say to the officials having the matter in charge, "If you do not keep the streets clean, you must retire and let others try"—and so on, until the work is done, or the doing of it is found to be impossible. Every department and every subdivision of a department should be subjected to this trial, even those which are supposed to be best conducted. Taking, for instance, the Department of Education, I would see whether it does not cost more than it need. In round numbers the annual cost is \$3,500,000, and the number of scholars about 120,000; that is, the education of each scholar is nearly thirty dollars a year. I mention this department, because it is the one for which the people appear to have the most affection, and which they think is the least mismanaged.

Other departments there are which need the unsparing hand and iron will of the reformer. I hope that the members of this club have many such, and that they may find in what I have here said something to invite them to begin the work, which they can not begin too soon.

## CENTRALIZATION IN THE FEDERAL GOVERNMENT.

Article by Mr. Field, published in the "North American Review," May, 1881.

THE perpetuity of the American Government is an object of supreme concern to every American. This Government took a century and a half to build; and when it was finished, and our fathers, after their long and painful toil, turned to look at the work of their hands, and beheld its massive foundations and its fair proportions, they were wont, in their enthusiasm, to exclaim, "*Esto perpetua.*" It is for us, their children, to preserve it. To keep it as it was designed, is one of the greatest political problems of our time. There can hardly be a greater, since it affects the welfare not only of all the millions born and to be born between these oceans, but of all elsewhere who might profit by their example. Why should we, as Americans, desire this perpetuity? Why should others, not our countrymen, desire it? Because, of all the bodies politic that ever existed, this is the only instance of a Federative Union as wide as a continent; and because, more than any other government in the world, it offers an asylum to the people of other lands, and promises to all ample protection with the largest freedom.

By the American Government, I mean that mixed system of national and State organizations which found their last and best expression in the Constitution of the United States. The vital principle of this system is the balancing of the governments, national and State, in such manner as to hold them for ever in equipoise. The annals of the colonies, and their intercolonial transactions; their joint labors and sacrifices, both before and after their independence; and the history of the Federal Constitution from the first conception to the completion of the great design, are so many testimonies to the gradual unfolding and final development of this principle.

The Declaration of Independence was the joint act of inde-



pendent States, then first styling themselves the United States of America. The Articles of Confederation, proclaiming on their face that they were articles of confederation and perpetual union, began with declaring that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled." And when, ten years later, "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty" to themselves and their posterity, the people of the same States established the present Constitution, they provided, not that *all* legislative powers, but that "all legislative powers *herein granted*," should be vested in Congress; then carefully enumerated these powers, under seventeen distinct heads; declared that the States should have a separate and equal representation in the Senate, and should act separately in choosing the President; and, finally, that no amendment should deprive any State, without its consent, of its equal suffrage in the Senate. Not content with this, the First Congress under the Constitution proposed ten amendments, preceded by this preamble: "The conventions of a number of States having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution"; after which preamble, the amendments were specified, and they were all adopted, one of which was the following: "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*" The men who framed this Constitution, they who in the several State Conventions ratified it, and they who sat in the First Congress, were persons of as much learning, experience, sagacity, and probity, as any equal number of persons that have ever lived in the world. They were grave and thoughtful men; they understood the temper and the wants of their own people; their hopes and fears had been tried and chastened in field and council; they

had studied the political systems of other countries and ages ; and they acted under a sense of the gravest responsibility that could rest upon the human conscience. There were Washington, Franklin, King, Sherman, Hamilton, Livingston, Morris, Madison, and Pinckney. If they were not able to judge aright, where shall be found those who can ?

They were right. They were right for their time ; and if, with prophetic vision, they could have looked forward into ours, they would have been more than ever confirmed in their opinion. Each State was then independent of the others ; each had its own traditions, wants, and policy. Massachusetts, whose towns had been little republics from the first settlements, would no more have thought of subjecting those towns, for their domestic concerns, to the rule of Virginia, than of sinking Boston in the waters of Massachusetts Bay. New York, which had her feet already planted at the entry of the sea, would as soon have thought of turning the Hudson backward upon the lakes, as of giving over to her sister States the unlimited control of her river valley and her imperial haven ; and Virginia, which did more than any other State for the establishment of the Constitution, would have expected the closing of the Chesapeake by a fence of stone, from headland to headland, as soon as the assumption by New York and Massachusetts of the power to regulate the counties and parishes of the old Cavalier Commonwealth.

We have now lived nearly a century under this Constitution. Three generations have come and gone since Washington took the oath as first of the Presidents. Is it not time to take soundings that we may see where we are ?

We see first that the Federal Government has overshadowed the State governments. In dignity, in honor, in emoluments, the officers of the nation have borne the palm from the officers of the States, however large the functions of the latter, or however high their stations. A State Senator of New York has a function more important and a larger constituency than a representative in the Lower House of Congress ; yet how few young men, ambitious of distinction, are to be found who would not prefer the latter ! We have even seen Governors of States stepping from their executive chambers into Federal

post-offices and custom-houses. How different from the time when it was a point of etiquette between Washington, as President of the United States, and Hancock as Governor of the State of Massachusetts, which, both being in Boston, should make the first call on the other! We have now at last seen the Legislature of a State thanking the President in the name of its people for appointing one of its citizens to a place in his Cabinet!

It is not, however, in forms or in matters of dignity, or honor, or emolument, that the distinction between the national and State governments appears in its strongest contrast. It is in the exercise of substantial power.

We need give but a few examples. A single encroachment submitted to or enforced against resistance is an invitation to other encroachments. Hardly had Washington left the presidency when, on the 14th of July, 1798, a statute was passed by Congress for the punishment of libel upon the Federal Government, either House of Congress, or the President. If this were within the competency of Congress, the punishment of libel upon any officer of the United States would be equally within its competency. Indeed, it is not easy to perceive why Congress might not take upon itself all remedies, criminal and civil, for any wrong done to the good name, person, or property, of any Federal officer, and send the parties before Federal courts for trial. Can there be a doubt that such an assumption of power was never dreamed of by those who framed or those who ratified the Federal Constitution? That statute, by its own limitation, expired with the administration of the elder Adams, and was one of the causes which led to the overthrow of the Federal party at the beginning of the century. The Democratic party then took possession of the Federal Government, and kept it until the younger Adams came into the presidency, in 1824. After him came Jackson for eight years, then Van Buren for four, Harrison and Tyler four, Taylor and Fillmore four, Pierce four, and Buchanan four. The relations between the Federal and State governments during all these periods continued without material change, except in respect of the tariff. Under color of levying customs duties at sea-ports, Congress has taken control of nearly the whole industry

of the country. There is not a city in any of the States, there is not a village along the rivers, and scarce a hamlet among the hills, that does not look to Congress more than to its own Legislature to determine the occupations of its people. Mills all over the land are built or left to decay, furnaces are lighted or extinguished, as parties or factions or the shifting influences of private interests swing to and fro at Washington. Under color of managing the national finances, Congress has covered the land with national banks, and placed them beyond the State courts or any State control. There are more than two thousand of them already. Under color of establishing post-offices and post-roads, and regulating commerce, Congress has passed a statute which gives to telegraph corporations, created by one State, the power of placing their lines along all post-routes in other States, without their consent and even against their will. Under color of the power to make regulations about the manner of holding elections for representatives, Congress has passed a statute providing for the appointment of supervisors and deputy-marshals to attend the places of registry and of voting when representatives are to be chosen, and "to inspect and scrutinize from time to time, and all times on the day of election, the manner in which the voting is done, and the way and method in which the poll-books, registry-lists, and tallies or check-books, whether the same are required by any law of the State, or any State, territorial, or municipal law, are kept"; and to "scrutinize, count, and canvass each ballot in their election district or voting precinct cast, whatever may be the endorsement on the ballot, or in whatever box it may have been placed or found"; to preserve order at the polls, prevent "fraudulent voting," and to arrest persons guilty of it, whether the voting be for State or Federal officers. Under this statute there were more than fifteen thousand supervisors or deputy-marshals surrounding the polls at the general election of 1876. And under the same statute, State officers have been punished by Federal courts for violating State laws.

Under color of enforcing the late amendment that no State "shall deny to any person the equal protection of the laws," Congress has authorized the punishment of the Judge of a county court in Virginia for not placing colored men on the

jury-list, though the State Legislature had made no discrimination. Under the same pretext, Congress has authorized the removal from a State court, before trial, of an indictment of a colored person for murder, because in that State white men only are placed on the jury-lists. Under color of protecting Federal officers in the discharge of their duties, Congress has authorized the removal from a State court, before trial, of an indictment for murder, on the allegation that the person indicted committed the homicide in the discharge of his duty as a revenue officer.

Worse than all, in flagrant defiance of the Constitution, and against the veto of the President, Congress, in March, 1867, placed the States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas under military rule, reducing them to the condition of subject provinces, opening the way to misgovernment by aliens and thieves beyond the dreams of Roman proconsuls, and then, with a refinement of irony in politics known only to those shameful days, declared that when the people of those States should have adopted new Constitutions, and the same should have been approved by Congress, and *the Legislatures* elected under them *should have ratified the fourteenth amendment, and that amendment should have been ratified by three fourths of all the States*, then these disfranchised States should be entitled to representation in Congress! That is to say, Virginia, for example, should be treated as a State and not a State at the same time; a State good enough to vote for an amendment of the Constitution, and to bind other States by the vote, but not good enough to vote in the Senate, or to be represented in either House.

The President, in some instances, has outstripped Congress in encroaching upon the rights of the States. Under color of what was called his war-power, he seized and imprisoned citizens of States not in rebellion, their courts being all the while open, and in one instance was about to put three of them to death, which he was prevented from doing only by the Supreme Court of the United States. Under color of his office alone, without any treaty, or any act of Congress, or any judicial process, he seized and delivered up to Spain a Spanish sub-

ject, who had sought shelter on our shores; and, under color of protecting a State against domestic violence, he turned out one Legislature and put in another in three of the States.

Let us pause here to consider whither the legislation thus briefly described would lead us if it were persisted in. Two observations are to be made: one, that the acts are in themselves a displacement of State power far beyond anything written in the early days of the Constitution, and probably far beyond anything then thought to be possible; and the other, that the theory on which they rest would, if carried out to its logical results, lead to the practical absorption in the central Government of all the chief functions of sovereignty. Indeed, it has become fashionable of late to call the power of the States "police power," as if these great commonwealths which, according to the theory, divide the attributes of sovereignty with the United States, and which make most of the rules of property and of conduct under which we live, had been reduced to the condition of a body of police officers! "Police power," as if the making of a will were a function of police! Police power, indeed, of States, which are not even permitted to guard their own polls by their own policemen!

I have said that the reasoning which supports the measures before mentioned would justify the virtual absorption of the chief functions of sovereignty. Take, for example, the Legal-Tender Act, by which Congress enacted that a mortgage for the payment of ten thousand dollars might be paid, not in dollars, but in Government promises to pay dollars, at a time when the promises were worth about a third as much as the dollars, and the Supreme Court sanctioned the enactment, not in the excitement of a war for existence, but in a time of profoundest peace. If the Federal Government may do this, what may it not do? There is no particular sanctity in a government promise; that of any other promisor would be warranted by the Constitution as well; and so it *might* be enacted that a debt could be paid in the promises of a national bank, or of any third person, nay, even those of the debtor himself. Then, again, if Congress may remove into a Federal court an indictment against a revenue officer, in order to secure to him a fair trial, why may it not for the same reason provide that he shall not be

indicted except in the Federal courts? and if this, why not go a step further in the same direction, and give Federal officers the right to sue and be sued only in courts of the Union?—which would be as much as to say that jurisdiction may be given to the courts of the United States over every suit, civil or criminal, by or against any person holding office under the United States. And, furthermore, if Congress can punish in Federal Courts State officers for violating State laws, it may make removal from office a part of the punishment, and it may punish unofficial citizens of the State for the same offenses; which is as much as to say that Congress may take upon itself the punishment of any offense against State laws. And if the United States may supervise all the details of an election held for different offices, because one of them is Federal, it may take complete control of the whole. At the late election, there were in this city eight ballot-boxes—five for State officers, two for Federal, and one respecting an amendment to the State Constitution. The Federal supervisors and marshals were empowered to examine every ballot in every box, as well those for President, members of Assembly, mayor, aldermen, State and city judges, and for or against the constitutional amendment, as that for members of Congress, to see that all were properly counted and returned, and to arrest for a false count or return, or what they thought to be such. The argument in support of this remarkable stretch of authority is that Congress has been empowered to regulate the manner of holding elections for Representatives, though not for the President, and it is thence inferred that, in order that every lawful ballot for a Representative in Congress may be counted, Congress may authorize the opening of all the boxes—as well that for Representatives as those for Presidential electors, members of Assembly, mayor, and aldermen, State judges, and about the constitutional amendment—the examination and counting of every vote, and the arrest and punishment of any person who may cast any ballot into any box which he had no right to cast. The soundness of this reasoning is denied; but, if it were sound, it would none the less show the tendency to centralization, and the danger of what is called a liberal construction of the Constitution. Congress has an undoubted right to collect

duties on imports, but it has no right to foster one branch of industry at the expense of another; and, when it uses its lawful power to accomplish indirectly what it can not do directly, it violates the Constitution.

The power to create a Bank of the United States was hotly contested in the early days of the Government, but was finally affirmed by Congress, the President, and the Supreme Court. The result has been not one, but two thousand banks. This is sufficiently startling; but authority to create a corporation as a means of executing the power of Congress being once admitted, and the further authority to reach into and across the States in pursuance of the authority to regulate commerce under them being also admitted, according to the decision in the Florida telegraph case, it should seem to follow that Congress may enact a general law for the creation of as many corporations as promoters desire, to facilitate commerce by coastwise steamers, railways, or telegraphs, or may regulate these steamers, railways, and telegraphs itself. In short, it is possible, as we see, so to construe the Constitution of the United States as to reduce the States to insignificance. This is the outcome of the legislation of Congress and the decisions of the Supreme Court since the beginning of the civil war. These decisions, it must not be forgotten, are reasoned out of the doctrine that Congress is *the sole judge* of the means it may use to carry its express powers into effect. There was an expression in one of Marshall's opinions, hereafter quoted, which seemed to impose a very important limitation upon this Congressional discretion, thus: "Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land"; but the words do not seem to have borne much fruit.

Whatever we may think of the soundness of the reasoning by which the various acts already mentioned (and there are others of like character) have been supported, there can be, as has been said, no doubt that they show a strong tendency toward centralization. This is not owing to any material



change in the recorded opinions of lawyers and statesmen respecting the theory of the government. From first to last these opinions use nearly the same phrases as were used in the old times, however much the conclusions in particular cases may appear to be at variance with the opinions.

No matter how politicians may sneer at State rights, the most authoritative exponents in the later, not less than in the earlier times, even those most inclined to liberal interpretation, have agreed in upholding, theoretically at least, the reserved sovereignty of the States. Thus Chief-Justice Marshall said, in *McCullough vs. Maryland*, that—

“No poetical dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.”

And in another place he said :

“In America the powers of sovereignty are divided between the Government of the Union and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.” Again : “We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.” And, finally: “But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution. . . . But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This Court disclaims all pretensions to such a power.”

Mr. Justice Nelson, in the case of *The Collector vs. Day*, said :

“The General Government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting

separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the General Government as that Government within its sphere is independent of the States."

In the case of *Texas vs. White*, Chief-Justice Chase said :

"Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national Government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States."

In *The United States vs. Cruikshank*, the present Chief-Justice said :

"The rights of life and personal liberty are natural rights of man. 'To secure these rights,' says the Declaration of Independence, 'governments are instituted among men, deriving their just powers from the consent of the governed.' The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these 'inalienable rights with which they were endowed by their Creator.' Sovereignty for this purpose rests alone with the States. It is no more the duty, or within the power, of the United States to punish for a conspiracy to falsely imprison or murder, within a State, than it would be to punish for false imprisonment or murder itself."

And in *Siebold's case*, Mr. Justice Bradley said :

"The true doctrine, as we conceive, is this, that while the States are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter are the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation."

If these extracts, given at such length, serve no other purpose, they will at least explain, in official language, the true theory of our government, and, compared with the measures already detailed, will also explain how different from the theory has been the practice. How is this practice to be accounted for? In three words: power without responsibility. By re-

sponsibility is, of course, meant accountability to those who are to be affected by the exercise of the power. If there be one political truth more than another taught by history as by reason, it is that responsibility can never, without danger, be separated from power. "Little responsibility, then little power," is the maxim of free states.

We have reduced the responsibility of members of Congress to the minimum. Senators are responsible to their own States, Representatives to their respective constituents. Here the responsibility in practice ends. What accountability does a Senator from Nevada, for example, feel to the Legislature or people of Massachusetts? What does a representative from a Michigan district care for the interests or wishes of a district of Florida, in comparison with the interests or wishes of his own? Why, then, in the name of justice, should the Senator from Nevada and the Representative from Michigan be allowed to participate in the government of Massachusetts and Florida? For no other reason and to no greater extent than there are interests common to the four States, which must, of necessity, be regulated by all of them, and where, if they do not agree, the majority must decide.

These common interests are few in number. They were considered at the formation of the Constitution, and set down in carefully chosen words. Since then the enormous expansion of our territory has increased the diversities of the different parts. The interests of California are less the interests of Massachusetts now than were the interests of Georgia at the beginning of the century. The separate interests will increase and the common interests diminish in number with every expansion of territory. How little of accountability to the country the members of Congress, in fact, feel, may be judged by the following late examples:

A bill to take from a large part of the country the safeguard of the *habeas corpus* was defeated only by the most persistent obstruction from the minority in the last days of a Congress. And yet who, of all the members that voted for the infamous bill, lost a reflection for that reason? Another bill—which, in fact, became a law—took from the Treasury an immense sum, estimated at several hundred millions, to pay what were called arrears of pensions, but which were not arrears or dues

of any kind. Who that voted for this legislative robbery lost by it? While we write, a bill has passed the two Houses appropriating eleven millions for what are called rivers and harbors, some of which have no claim to national recognition. Senator Thurman called it a scheme "to reelect members of Congress." How was it expected to work? A member from a district whose people want employment, and a plentiful disbursement of public money, expects to win popularity and votes by giving them the opportunity. These constituents of his contribute little to the Treasury, but get much out of it. He votes away other people's money, the contributions of other constituencies than his own; but to them he owes no accountability. Of the seventy-six Senators, only forty-four voted; and of these, twenty-six Democrats and six Republicans voted for the bill, eight Democrats and four Republicans voted against it, which would leave nine Democrats and twenty-three Republicans who did not vote at all. This lack of responsibility is in the nature of things. There were probably few members of either House who thought that their own constituents would suffer from the measure, and so rebuke them for it.

Senators and Representatives feel no accountability to the country at large, because there is none in fact. Each member stands or falls by his own constituents, and by them alone. Such, at least, is the general feeling. The only way to make that accountability minister to the general good is to make every measure fall upon the constituents of each member as it falls upon the constituents of others—that is to say, to give him authority to legislate only upon the common concerns of all. It may, of course, sometimes happen that legislation upon these common concerns may not affect all parts of the country in the same way or to the same degree, but that does not change the principle of legislating only upon concerns that are common to all, and in some way affect all.

The American theory of government is self-government. This means that the individual remains his own master in all that concerns only himself. When his actions interfere with the actions of another, the two act together. Whatever may have been the origin of the social compact or body-politic, this is the theory on which joint action is founded, whether of two

persons or of many. Whatever concerns one alone is for him to do ; whatever concerns his neighbor and himself is for the two to do together ; and so on, through all aggregations of individuals, until we arrive at that final organization which we call the State. When that stage is reached, States may unite with other States for the management of common concerns, and so form a central union, federative or national. This does not mean that Massachusetts shall govern South Carolina, or South Carolina Massachusetts ; but that each shall govern itself in all that pertains to itself ; and that, in matters that pertain to both, the two shall govern both. For if, in a matter that concerned both, the two should not of choice act together, and one should act for both ; or if the two, acting separately, should come into collision, and one force the other to yield, the principle of self-government would be lost. The separate concerns of the States are for the States to manage, each by itself : common concerns are for all together, that is, for the United States. This is the theory of American government carried to its logical results. In the smallest political organization—as, for example, a New England township—the members vote in person ; in the larger townships the members vote by representatives. But the principle of the limitation of power is the same in both. The town assembly is limited by the statutes of the State ; the State Assembly is limited by the State Constitution ; and the Federal Assembly by the Federal Constitution.

The interests common to all the States are, as has been already said, few in number. The framers of the Constitution undertook to enumerate them, and the enumeration they agreed upon is fixed in that organic act, there to remain for ever, unless changed by amendment. The aim of this instrument was to keep the States at peace with each other, and to present them as one in their relations abroad. General taxation, war, treaties, foreign and interstate commerce, postal service, bankruptcy, copyright and patent right, naturalization, coinage—these were objects of common concern. To such objects the Federal Government was to be limited. Its founders were sagacious men ; they walked in the light of the soundest philosophy ; they saw that a republican government could not be maintained over so large a country without a strict limitation of its powers.

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It has never yet been done; there is no reason to suppose that it ever will be done; there is every reason to suppose that it will not. Our country, at the close of the last century, covered as large a part of the earth's surface as Great Britain and Ireland, Germany, France, and Spain; it is now nearly as large as the whole of Europe. Let us suppose a representative government, with plenary powers over Great Britain and Ireland, France, Spain, Italy, Switzerland, Germany, Belgium, Holland, Denmark, Russia, Austria, Sweden, and Norway, and ask ourselves how long it would probably last. Should we not agree that it would not last a decade?

We hear sometimes of a federation of the world. A closer union of the nations, through some great council, by which international disputes may be settled, and war prevented, is the dream of philanthropists and the hope of the Christian believer. But how could such a consummation be brought to pass? Only by a treaty binding the good faith of the nations to abide by the advice of a consultative body upon a few subjects, neither wounding national susceptibilities nor trenching upon national autonomy. Imagine representatives from the United States, Great Britain, the Germanic Empire, the Austrian double-headed monarchy, the Russian autocracy, and patriarchal China, meeting in one chamber to discuss the affairs of so heterogeneous a constituency. What affairs would they discuss? None but those in which they have a common concern; they would not so much as lay a little finger upon the separate interests of any nation. If ever a scheme of closer union should be brought about (and I am one of those who think it possible to bind the nations together closer than they have ever yet been bound—the Berlin Congress went a long way toward it), it will be through some special organization, having as its vital principle the impregnable autonomy of all the nations. If it be possible to agree upon a representative body limited to the consideration of a few subjects of universal concern, and so limited that the boundary can never be overpassed, then, and then only, such a union may be possible.

The parallel between a federation and a constitutional union is of course incomplete. The difference between them lies in the power of the latter to enforce the decisions of the

majority. But the principle upon which the harmony of the members depends is the same.

This is a federal republic. In the late Presidential canvass an occasional sign was put up that "this is a nation, not a league." The sign was true in one sense, but not in all. A nation, strictly considered, is a political body, sovereign in all things over all its members. Ours is *not* such a nation; it is sovereign to the foreign world in most things, but even then not in all. It could not cede to Great Britain, for example, a part of Maine without Maine's consent. In our domestic world, it is sovereign only in a few things. In most of the concerns of our daily life, it is not more sovereign over us than is England or France. A fashion is creeping in slowly, and no doubt carelessly, of using the words "United States" as a nominative singular; some persons have been bold enough, indeed, to say "the United States is." This is as bad in grammar as in fact. The Constitution says nothing of the kind: "No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under *them*," is the language of the ninth section of the first article; and "Treason against the United States shall consist only in levying war against *them*, or in adhering to *their* enemies," is that of the third section of the third article. The letter signed by Washington and addressed by the Convention to the Continental Congress, inclosing the Constitution, contained this paragraph: "It is obviously impossible in the *Federal government of these States* to secure all rights of the independent sovereign to each, and yet provide for the interests and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest; the magnitude of the sacrifice must depend as well on the situation and the circumstance as on the object to be attained. It is at all times difficult to draw, with precision, the lines between those rights which must be surrendered and those which must be reserved." The words "Federal" and "Confederacy," as applied to the Union, were of frequent occurrence in our earlier public documents. Washington used the adjective "federal" to designate the territory belonging to the United States in the District of Columbia; Jefferson spoke of the "establishment of our present Federal

Government"; Madison of the "various forms of our extended Confederacy"; John Quincy Adams of the "constitutional power of the Federal Government"; Jackson of the "patronage of the Federal Government"; Van Buren of the "concerns of the whole Confederacy"; Harrison of the "powers which have been granted to the Federal Government"; Tyler of the "office of President of this Confederacy"; Polk of the "safeguard of our Federative compact"; Pierce of the "sole reliance of the Confederacy"; and Buchanan of the "construction of the Federal Constitution."

The strong tide that for twenty years has been setting toward centralization is no doubt due in part to the surges of the civil war. The nation was struggling for life, and those who administered its affairs did not always measure their power by their right. This was deplorable, for the Constitution was made for war as well as peace, and there was never a necessity for stretching its powers beyond the tension which itself allowed. But the civil war is not responsible for all that has happened. A National Bank and a tariff came before the war; the interference with the elections has come since; the other measures, if they grew out of the war, were continued long after the last gun had been fired. There are causes tending to centralization more permanent than our great conflict of arms.

It must not be forgotten that this is a new form of government; though it has lasted nearly a century, yet that is but a span in the life of a people. Think of it as we may, we can not help confessing to ourselves that the system under which we live is even yet an experiment. Ours is the only federal republic that ever embraced a continent and governed fifty million inhabitants. Never before have so many great and opulent states, with such diversities of interests, been brought together under one national authority. Flanked by an ocean on either side, stretching with Alaska almost from the torrid to the frozen zone, yielding every fruit of the bounteous earth, and displaying the fairest forms of hill and plain, lake and river, it stands a world in itself, with all its diversities of industrial and social life. The interests of the people in such a country must be as various as the wide and diverse regions they inhabit.



The pressure upon the Federal Government for the exercise of its powers comes from four different quarters: the performance of the natural functions of government, the interests of majorities, the demands of party, and the schemes of monopolists. Against the operation of these causes, what is there to oppose usurpation or to compel moderation? Nothing but the limitations of the Constitution, the resistance of the coördinate departments, and the vigilance of the people.

The limitations of the Constitution are plain enough in themselves. It would be hard to find language more carefully chosen or more easily understood. The framers of the Constitution thought that they had found the means of limiting effectually the powers of Congress, when they had thus enumerated them, and established two coördinate departments—the executive and judicial—as a counterpoise to the Legislature. In practice, however, the counterpoise has not proved equal. For this there are two reasons: one, that the Presidential veto may be overridden by two thirds of each House, as, in fact, it has been on the occasions when it was most needed; and the other, that the Supreme Court has either given way before the resolute will of Congress, or has so construed the discretion of the Legislature, in the choice of means, as to leave that department of the Government to define and limit its own powers in particulars the most important to the equipoise of the Constitution. Thus, when President Johnson vetoed the Reconstruction Bill, it was promptly re-passed by more than two thirds of each House, and he was impeached, and barely escaped with his office, for opposing the will of Congress; and the Supreme Court was prevented from pronouncing its judgment upon the same measure, by the defiant attitude of Congress, and its repeal of the law which gave the Court jurisdiction. In another instance, that Court was made, by seating two new Judges, to reverse its previous decision against the constitutionality of the act which made Government promises to pay equal to payment. It seems, therefore, a vain thing to look to either the President or the Supreme Court for effectual resistance to the determined will of Congress. In theory, indeed, an act of Congress against the Constitution is a nullity. Chief-Justice Marshall said that long

ago, in these memorable words, which form part of his opinion in *Marbury vs. Madison* :

"This original and supreme will " (that is, the will of the people) "organizes the Government, and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments. The Government of the United States is of the latter description. The powers of the Legislature are defined and limited ; and, that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained ? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."

All these limitations and supposed safeguards have not sufficed, however, to defend us against the strong tendencies to centralization, because the all-important qualification that in the choice of means Congress has in fact discretion the most ample, leaves the legislative department of the Government in possession of a mass of powers, original and incidental, for the safe and wise exercise of which the States and the people have no adequate guarantee but in themselves.

Vigilance is born of intelligence and will. They who exercise it must not only watch, but determine. In this way, and this only, can the tendency to centralization be arrested.

That it must be arrested, if we would preserve our liberties, seems too plain for discussion. If there be any certain conclusion to be drawn from history, it is that a consolidated government can not be established on so wide a domain, unless it be monarchical. In Metternich's "Memoirs" is a remarkable passage on the condition of Germany after the downfall of Napoleon :

"The idea of the state must rest on the basis of a united sovereignty, whether that of a personal sovereign or that of the sovereignty of the people. The personal sovereign may reign over several countries different in their provincial laws and in their local interior administration. One sovereign people can not rule over another."

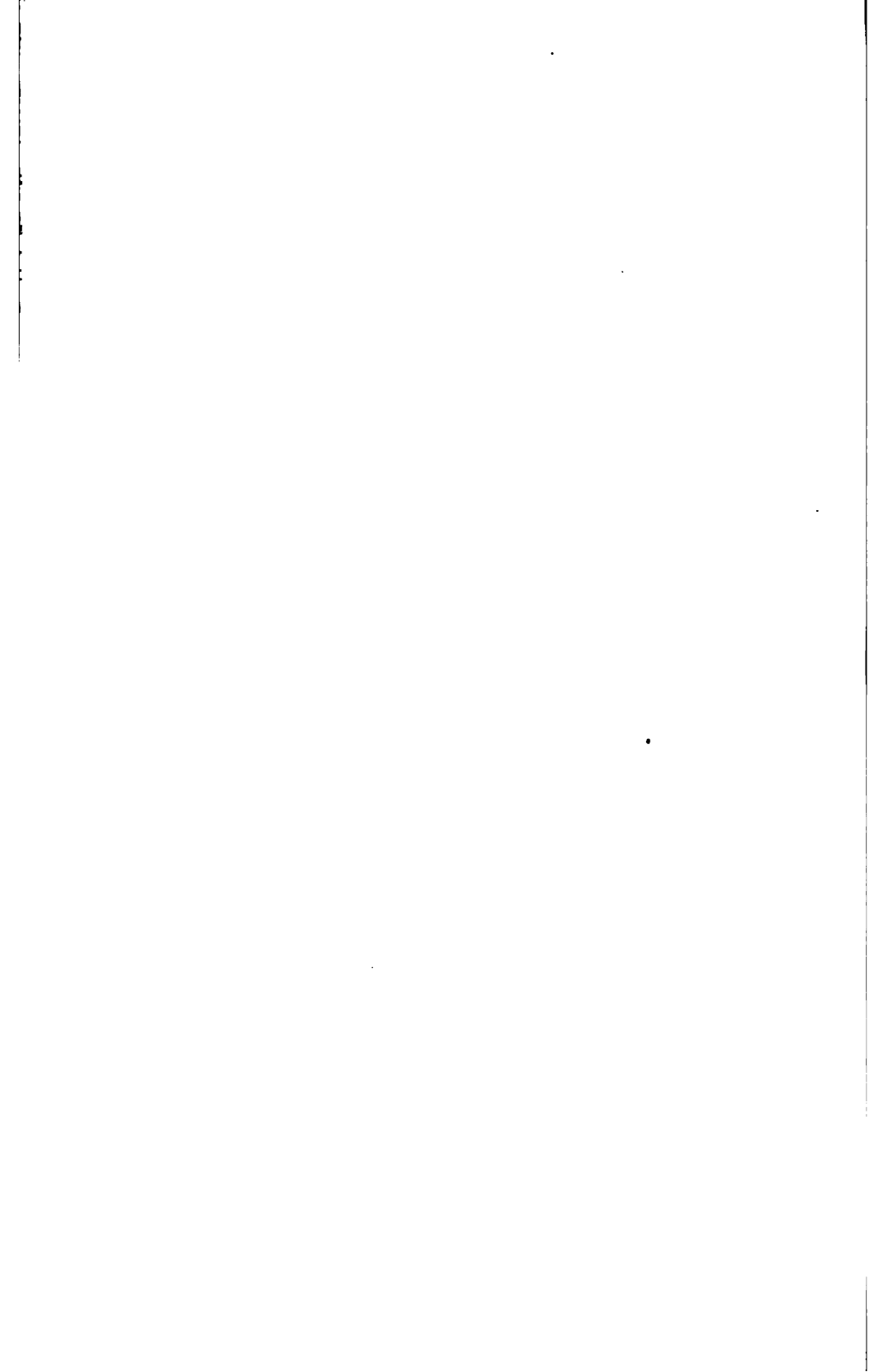
This seems to me the statement of a political principle applicable to men everywhere, and especially to us : "One sovereign people can not rule over another."

In a public address, several years ago, General Garfield estimated the number of Federal office-holders at more than a hundred thousand. Our population was then about forty millions, which would place in the Federal service one in every four hundred of all the people. Only a fifth of the persons living are adult men; so that one in eighty of these adults is fastened on the Federal Treasury, and probably every fiftieth family is dependent upon it. Add to this that, according to the prevalent theory, the dependence is precarious, because the troops of office-holders follow the fortune of their party, taking or losing office as it rises or falls. Is it any wonder that the country is yearly burdened with more patronage, and driven on to the exercise of more power?

The disposition, of course, increases with the indulgence. Every encroachment is a temptation to a new one. How soon successful resistance will come, it is impossible to foretell. Let us hope that it will come by the peaceful exercise of the ballot in the ordinary elections. It may come in the form of a revision of the Federal Constitution, or it may come—which Heaven avert!—with violent convulsion. One thing appears to be certain, and that is that the country will not be divided. Under some form of government, and with more or less of freedom, the United States will maintain their dominion from sea to sea. If encroachments go on increasing, the pressure upon particular sections will become heavier and heavier; there will be on the one hand a demand for a stronger government to put down resistance, and on the other a demand, in order to protect minorities, for the establishment of some authority which is not controlled by fluctuating assemblies. At least, it may be set down, as not consistent with the nature of things and the order of events, that a hundred millions of people, covering twenty-four degrees of latitude and fifty-eight of longitude, with all the diversities of soil, climate, and productions which our country displays, should continue to be governed in all their concerns by an assembly of representatives, who can not in some way be all reached by all the constituencies.

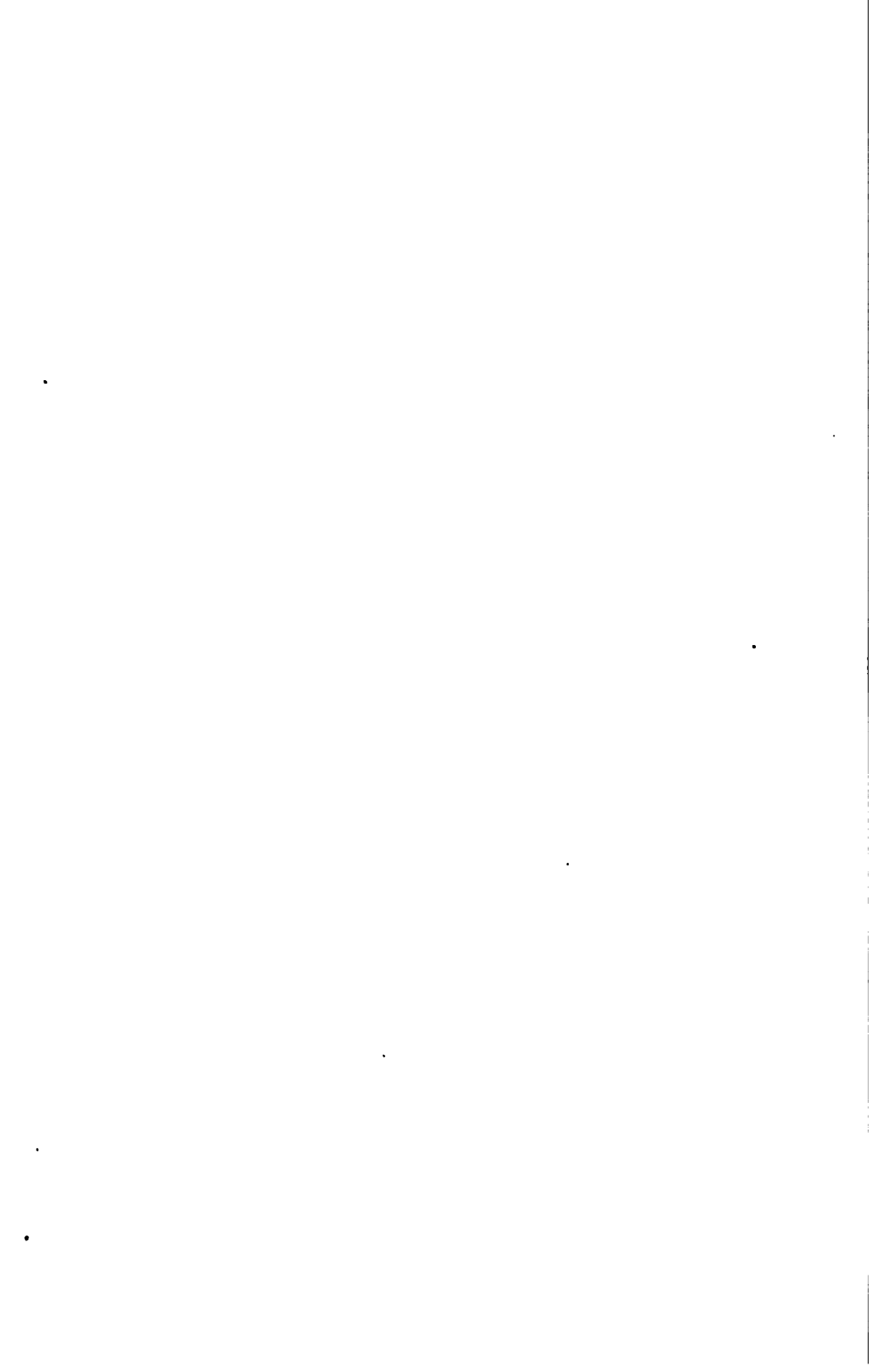
We have said that the great ends of government are unity and freedom. The former we are sure of; for it does not seem possible that any causes now discernible can divide the Ameri-

can people into two or more republics, nations, confederacies, or other forms of political organization. We are united and shall remain united under some form of government, whatever it may be. Are we as sure of our freedom as of our unity? That depends upon the preservation of the States in the plenitude of their power, as they stand under the Constitution, nothing added and nothing taken away by unjust interpretation or unlawful force. Security for person and property is more important even than unity. For this security we depend upon the States. To be a State of the American Union is to be sovereign in everything within its own borders, except where the sovereignty in a certain limited number of things has been granted to the common Government of all the States. "Sovereign States" should be kept as a good old-fashioned expression. Long may it live! *State rights* got a bad name because they were pushed to excess—nullification was a folly, and secession was a crime—but because this folly and this crime were committed in the *name* of State rights, it would be folly to infer that the name may not have a good meaning and represent a useful thing. "Confederacy" was a name abhorred when we were fighting the Confederate armies, but we are not now to be frightened by a word. The ceiling of the Representatives' chamber in the Capitol is divided into panels of glass, through which the sunlight pours into the room, and on which are painted, one after another, the names and escutcheons of the several States whose representatives sit below. There is the emblem of New York and her motto "*Excelsior*," and there the emblem of Virginia and her motto "*Sic Semper Tyrannis*"; Massachusetts, with sword uplifted, writes "*Ense petit placidam sub libertate quietem*"; and Pennsylvania displays her eagle crowned with light, and proclaims "Virtue, Liberty, and Independence." Every escutcheon set above the chamber represents a sovereign State, which has a history, a pride, and a policy of its own. In the same ceiling are vacant panels, left for future States as they are expected to come in long procession. A thoughtful person, looking up at them, can not but ask himself, Will they ever be filled? That depends on the men who sit beneath, and on the people who send them there.



## PART IV.

*ADDRESSES AND PAPERS ON MISCELLANEOUS SUBJECTS.*



## MISCELLANEOUS SUBJECTS.

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### THE POLITICAL WRITINGS OF WILLIAM LEGGETT.\*

Article by Mr. Field, published in the "New York Review," April, 1841.

ALTHOUGH the political writings of Mr. Leggett are, for the most part, in direct opposition to the established principles and to the uniform spirit of our journal, we confess that we lay down these volumes disarmed of every disposition to criticise or condemn them. Admiration for the author's talents and respect for his fearless independence are the predominant feelings which the perusal of them has left upon our minds; and we here make our acknowledgments to Mr. Sedgwick for rescuing them from the oblivion into which they must have fallen but for the more permanent form in which he has presented them. It was, we learn, an act of pure friendship on his part, the proceeds of the publication being wholly for the benefit of Mr. Leggett's family; and we regret that the work has not as yet received the attention from the public to which its merits entitle it.

Mr. Sedgwick has done well the work which he undertook. He has selected and arranged from the miscellaneous editorial

\* A Collection of the Political Writings of William Leggett. Selected and arranged, with a Preface, by Theodore Sedgwick, Jr. In Two Volumes. New York: Taylor & Dodd. 1840.



articles which find their way into the columns of a daily newspaper, as each day brings up, with its various and diversified burdens, new facts and new topics, such as may have the most permanent interest, and best exhibit the manner and the mind of his friend. These newspaper articles must not be judged by the general character of their class. Mr. Leggett was a prominent and most able political writer. In the fierce contest waged between the two great parties during the latter part of General Jackson's Administration, he engaged with all his heart, and advocated, with an ability equal to his earnestness, what many considered extreme opinions. His boldness, his straightforward eloquence, and the spirit with which he clung to a theory or principle, gave him great influence over men's minds. Wherever he obtained a footing after removing the prejudices which the advocate of extreme opinions will always encounter, his influence was certain to be great.

Some of the topics of these articles were such as interested merely the times for which they were written; but most of them interest all times, and all of them are discussed with so much vigor, and reasoned out with such close and fearless argument, that the skill and power of the writer win the interest which the subject might have failed to awaken.

We have here the subjects of most of the controversies which agitated the country at the period we have mentioned—banking—the Bank of the United States—monopolies and free trade—corporations—abolition of slavery—the French indemnity—the Presidential contest—and the character of President Jackson. These subjects are all interwoven with the history of the country, and many of them have a permanent and essential interest which will outlast administrations and generations. What such a man as Leggett has written on these topics, and written, too, in the midst of the strife, under the heat and pressure of hourly struggle, can not be a matter of indifference to a right-judging person of any opinion or party.

The style of these selections is unadorned, but free, hardy English, transparent as water, sometimes departing from the purest idiom, but always strong and spirited. Take, for example, the following article on the "Morals of Politics" from "The Plaindealer," of June 3, 1837:

"Public moralists have long noticed with regret, that the political contests of this country are conducted with intemperance wholly unsuited to conflicts of reason, and decided, in a great measure, by the efforts of the worst class of people. We apply this phrase, not to those whom the aristocracy designate as the 'lower orders'; but to those only, whether well or ill dressed, and whether rich or poor, who enter into the struggle without regard for the inherent dignity of politics, and without reference to the permanent interests of their country and of mankind; but animated by selfish objects, by personal preferences or prejudices, the desire of office, or the hope of accomplishing private ends through the influence of party. Elections are commonly looked upon as mere games, on which depend the division of party spoils, the distribution of chartered privileges, and the allotment of pecuniary rewards. The antagonist principles of government, which should constitute the sole ground of controversy, are lost sight of in the eagerness of sordid motives; and the struggle, which should be one of pure reason, with no aim but the achievement of political truth, and the promotion of the greatest good of the greatest number, sinks into a mere brawl, in which passion, avarice, and profligacy, are the prominent actors.

"If the questions of government could be submitted to the people in the naked dignity of abstract propositions, men would reason upon them calmly, and frame their opinions according to the preponderance of truth. There is nothing in the intrinsic nature of politics that appeals to the passions of the multitude. It is an important branch of morals, and its principles, like those of private ethics, address themselves to the sober judgment of men. A strange spectacle would be presented, should we see mathematicians kindle into wrath in the discussion of a problem, and call on their hearers, in the angry terms of demagogues, to decide on the relative merits of opposite modes of demonstration.

"The same temperance and moderation which characterize the investigation of truth in the exact sciences belong not less to the inherent nature of politics, when confined within the proper field.

"The object of all politicians, in the strict sense of the expression, is happiness—the happiness of a state—the greatest possible sum of happiness of which the social condition admits to those individuals who live together under the same political organization.

"It may be asserted, as an undeniable proposition, that it is the duty of every intelligent man to be a politician. This is particularly true of a country the institutions of which admit every man to the exercise of equal suffrage. All the duties of life are embraced under the three heads of religion, politics, and morals. The aim of religion is to regulate the conduct of man with reference to happiness in a future state of being; of politics, to regulate his conduct with reference to the happiness of communities; and of morals, to regulate his conduct with reference to individual happiness.

"Happiness, then, is the end and aim of these three great and compre-

hensive branches of duty; and no man perfectly discharges the obligations imposed by either who neglects those which the others enjoin. The right-ordering of a state affects, for weal or woe, the interests of multitudes of human beings; and every individual of those multitudes has a direct interest, therefore, in its being ordered aright.

"'I am a man,' says Terence, in a phrase as beautiful for the harmony of its language as the benevolence and universal truth of its sentiments, 'and nothing can be indifferent to me which affects humanity.'

"The sole legitimate object of politics, then, is the happiness of communities. They who call themselves politicians, having other objects, are not politicians, but demagogues. But is it in the nature of things that the sincere and single desire to promote such a system of government as would most effectually secure the greatest amount of general happiness can draw into action such violent passions, prompt such fierce declamation, authorize such angry criminations, and occasion such strong appeals to the worst motives of the venal and base, as we constantly see and hear in every conflict of the antagonist parties of our country? Or does not this effect arise from causes improperly mixed with politics, and with which they have no intrinsic affinity? Does it not arise from the fact that government, instead of seeking to promote the greatest happiness of the community, by confining itself rigidly within its true field of action, has extended itself to embrace a thousand objects which should be left to the regulation of social morals, and unrestrained competition, one man with another, without political assistance or check? Are our elections, in truth, a means of deciding mere questions of government, or does not the decision of numerous questions affecting private interests, schemes of selfishness, rapacity, and cunning, depend upon them, even more than cardinal principles of politics?

"It is to this fact, we are persuaded, that the immorality and licentiousness of party contests are to be ascribed. If government were restricted to the few and simple objects contemplated in the democratic creed, the mere protection of person, life, and property; if its functions were limited to the mere guardianship of the equal rights of men, and its action, in all cases, were influenced, not by the paltry suggestions of present expediency, but the eternal principles of justice—we should find reason to congratulate ourselves on the change, in the improved tone of public morals, as well as in the increased prosperity of trade.

"The religious man, then, as well as the political and social moralist, should exert his influence to bring about the auspicious reformation. Nothing can be more self-evident than the demoralizing influence of special legislation. It degrades politics into a mere scramble for rewards obtained by a violation of the equal rights of the people; it perverts the holy sentiment of patriotism; induces a feverish avidity for sudden wealth; fosters a spirit of wild and dishonest speculation; withdraws industry from its accustomed channels of useful occupation; confounds the established distinctions between virtue and vice, honor and shame, respectability and

degradation; pampers luxury; and leads to intemperance, dissipation, and profligacy, in a thousand forms."—(Vol. ii, pp. 822–826.)

"The Plaindealer" was discontinued in September, 1837, and in the spring of 1839 Mr. Leggett died at New Rochelle. His life had been one of great vicissitude. He was born in New York in 1802, and removed to Illinois with his father's family in 1819. In 1822 he entered the navy, and four years afterward resigned his commission, in consequence of a personal difficulty with his commander. His manner of life naturally tended to form his political character. It inspired him with hatred of tyranny, and sympathy with poverty or misfortune. It led him to look with a sad, sober eye upon human life, and to search deeply into the secret springs of conduct. It taught him to compare different conditions of men, and to perceive the fundamental differences between the systems of the Old World and the New. While it tended to create in him distrust of authority, it led him to look for remote causes and ultimate principles. It gave boldness to his thoughts and energy to his expressions.

When he came to have the control of a public paper, his mind had become thoroughly imbued with certain fundamental principles of politics. With an intense love of justice and truth, with strong logical powers, with a bold, inquisitive spirit, he used those principles with prodigious effect. If he sometimes carried them too far, or rather, if he overlooked other principles or facts, which might modify them or check their application, the logical correctness of his deductions from his premises was to him more than a compensation for the practical error.

Without entering at all into the question of the correctness of his political principles, or mixing ourselves now with the party contests of the time, which, we beg it may be understood, we desire particularly to avoid, and without stopping to observe upon some faults of style which are very obvious to every scholar, we take this occasion to mention two remarkable peculiarities of Leggett as a political writer—his **AMERICAN PRINCIPLES** and his **INDEPENDENCE**.

In these respects he was honorably distinguished. There

were other points in which he failed. He was of an ardent temperament and an irritable disposition. These qualities led him often into a warmth and even bitterness of expression which all must deplore. Sincere and sanguine himself, he could not bear with less open or more doubting natures; and in moments of excitement he was led to speak of those who held opposite principles or labored in an opposite party with more acrimony than became him or his cause. In this way he made some enemies, whom a manner more conciliatory might have softened, if it had not convinced. In pronouncing an impartial judgment, we must admit that his influence was weakened, and his course of life troubled, by the severity with which he attacked the adversaries of his opinions. His life affords, in this respect, a useful lesson. Moderation is the great lesson which every party writer, and every American statesman, must learn. The country is too wide and too mighty, there are too many vast interests bound up with every form of social existence among us, to make us fit subjects for great sudden changes. All human affairs are affected by a multitude of causes, and he who attempts to push to its extremes any one principle, unless it be of universal application, makes a mistake not less as a moralist or a philosopher than as a statesman. Above all, every party writer should bear continually in mind that personal controversies never advance the truth. A literary man, be he bound up with party never so closely, need have no personal enemies. Others may combat his opinions without attacking the man. They may deny the doctrine, while they respect and love the teacher. They may honor him, and not be his disciples. The reasoning may not convince, but it may make them respect the understanding and sincerity of the reasoner. Although Leggett was involved in some of these personal controversies, they are now, we trust, forgotten. He has gone to the grave. The personal conflicts, into which his editorial profession and his peculiar temperament led him, can have left no trace in the mind of any honorable antagonist. The grave has closed over the animosities of his stormy political life, and over the rivalries into which he entered. We have now to recollect only the writer, and see what there may be in his writings by which we can profit.

One distinction of Mr. Leggett's mind was, as we have remarked, its American character. That there breathes in the institutions of this country a peculiar spirit, a spirit nowhere else to be found, no one can gainsay. A great fundamental principle lies underneath our civil polity. To conform to this principle, if not to illustrate and develop it, is to an American political writer an essential condition of success. Leggett fulfilled the condition. He not only felt as an American, which indeed most Americans do, for there is a profound nationality at the heart of the American people, but he thought and wrote as an American. In this respect, he was unlike most of the writers of his country. Americans continue even now to write and think too much like Englishmen in a new hemisphere. It was not thus with Leggett. It was his distinction, not above all others certainly, but above most of our educated men, to have reasoned from the facts before his eyes, from the character of the people among whom he lived, and from the institutions under which he was born. In political questions, he kept in view the nature of our government, the spirit of our institutions, and the actual condition of society among us. He saw, what all men will come at last to see, that our political condition will recast our ideas about government and society, that it will modify our tastes, enlarge our sympathies, and in no inconsiderable degree remodel our social condition.

We are a new nation with old opinions; our facts have outrun our ideas. This apparent incongruity is easily explained by our history. Our forefathers came to this country English in customs, English in opinions, English in tastes. Whether they had fled from the tyranny of the Crown or the Church, or had come in quest of wealth or adventures, they thought of nothing so little as of abjuring their allegiance or forgetting their origin. They were still proud to call themselves English, and to remain a part of the great body of Englishmen. Their books still came to them from England. She taught them, she guided them. To the extent of their local policy, and no more, they governed themselves; in every other respect they were as much a part of England as if they had lived in Kent or Norfolk. The laws which they adminis-

tered were the laws of the mother-country; the rights which they claimed were the rights of Englishmen. Their literature was all transplanted. The colonial press gave them little except books of divinity. The clergy was almost the only learned body among them. As the colonists multiplied and spread, they carried with them the same ideas and the same habits. Their discussions were all political or religious. In their political discussions they treated of the rights they had inherited from their fathers. In this state the Revolution found them. They separated from England on a question respecting their ancient franchises.

The Revolution left them emancipated, for the first time, from the dominion of another people. Independence led naturally, and in their circumstances necessarily, to a republican government. The establishment of another throne, after their conflicts with that to which they had renounced allegiance, would have been abhorrent to all their feelings. Independence led, therefore, to a republican government, and republican government established along with it—the *political equality of men*. From this doctrine of equality, as from a root, it was inevitable that there should spring forth a new code of rights and duties, new social relations, and with them new motives, new hopes.

Few men, perhaps, foresaw all the consequences of this new state of things. There had never been before, in the history of the world, an instance of a people in a high state of civilization, acquainted with the literature and the arts of the most cultivated nations, separating themselves from another, and assuming at once institutions so new, and founded upon principles so entirely different, as to lead to new social relations. History, therefore, furnishes us no example of the consequences of such an event upon the habits and opinions of a new political community. There have been colonies that have revolted and become independent, and nations that have changed their government, but in circumstances widely different. The current of events swept our forefathers on with great rapidity. They were driven to independence, as the only means of maintaining their ancient liberties. In the heat of that awful struggle, while they claimed only the liberties

they had inherited, they appealed to ultimate principles to establish the reasonableness of the rights which they claimed. To what length the new doctrines and the new state of political independence might afterward lead them, was, perhaps, scarcely a question amid the exigencies of a civil war. Their habits, their tastes, their social relations, could not change as fast as their political condition. While the volcano of revolution was heaving up beneath them the foundations of their old systems of government, and while they themselves were engaged in erecting upon new foundations a new system for themselves and their children, they perhaps did not feel how vastly their relations with each other, each man with his neighbor, were changed also.

The slow but irresistible hand of Time is doing what the upheaving of a political system could not do. Nothing but time could do it, and it is not yet all done. Our political systems have little affinity with any that have ever yet existed; but nevertheless our literature, our education, with all its prejudices, and our social habits, continue to be immeasurably influenced, if not governed, by the old systems which were long ago rejected. There is an invincible opposition between the systems of the Old World and the New, and all those ideas which had their origin in different principles of government are inapplicable to this new state of things. The European governments are all of them founded upon opposite principles. They are of feudal origin, partaking largely of military organization and the distinction of ranks. The leading idea of feudal government and of all modern European society is the subordination of ranks. Here is the great distinction between European and American governments. Both may consist with a high degree of liberty, as all know who have any knowledge of the history of the last century. It would be idle to deny that England and France both enjoy at this day, and that the former, under the most aristocratic institutions, has long enjoyed, a large measure of freedom. Private rights are in general maintained, the law is impartially administered, and the public voice is heard in the chambers of legislative assemblies and in the cabinets of kings. Every man there may feel that in yielding to authority he is obeying the laws, not the caprice



or the arbitrary will of any prince or magistrate. But an American sees in the institutions of his country the signs and the influence of another principle. There is not in all our institutions (we speak not of our habits, or our society) a single aristocratic element. Everything in our theory of government, and everything in our political organization, indicates that they have proceeded from the idea of the political equality of mankind; and they teach that doctrine as the only foundation upon which they can stand. The lesson which they inculcate is the lesson of fraternity. This doctrine contains within itself a living principle, which, if suffered to exert its proper influence, not counteracted by untoward circumstances, would inspire us with a warm and active sympathy for every human being. It would infuse into the heart a sense of our intimate relationship with all our fellows, and lead us to look upon every man, however poor and humble, as having infinitely more in common with us than we can have, which he has not, and as being, so long as he has not forfeited his high privilege by crimes, our equal and partner in the state. Would to Heaven that there might arise some master-spirit, who should teach this doctrine of equality to our countrymen as it might be taught, and as they will one day understand it; to show them how it leads to the abasement of none, but to the elevation of many; how it infuses into countless multitudes, who might otherwise have lived despairingly, new hopes, self-respect, and energy to labor and to bear; how the haughtiest spirit and the loftiest mind may be purified and exalted by universal sympathy; how this equality, not of strength, nor of genius, nor of external circumstances, but in rights and essential attributes, is the peculiar doctrine of the American people, their ornament, their glory, the foundation of their strength, and the chief source of their prosperity! The institutions of Europe rest upon other foundations. There the state is bound together by the chain of ranks, here by the lighter but stronger chain of brotherhood.

This distinctive principle, as we have already observed, though it lies at the foundation of all our political institutions, and though it has been silently working its way into the hearts of the people, has not yet thoroughly pervaded the mind of the

nation ; and least of all has it infused itself into our literature. This is as yet but a shoot from the old English trunk, a noble trunk indeed, that has put forth wide-spreading branches, and borne most precious fruit. But may we not hope at some time to sit under the shelter and shade of our own tree ?

Hitherto our education has been more English than American. The books with which an American is surrounded from his infancy come to him chiefly from abroad. The treasures of history, of poetry, of romance, the gifts of the master-minds of the language ; treasures which the young man loves to gather, and which the old man holds above all price—these, precious as they are, contain much which is unsuited to our country, and more which is useless. Not being provided with a literature of his own, the American is subjected to two opposite systems of training ; one from books, the other from the life which he sees around him. Is it any wonder, then, that he should make great mistakes ; that there should appear in his conduct something of the contrariety of his education ; that he should be often confused, should hesitate, stop sometimes, sometimes turn backward ; and, even when he advances, do so with a trembling step, ready to follow the first guide, or obey the first call that may lead him astray ?

The distinction of ranks, the classification of society, affects all modern literature. What indeed is literature, but the voice of society ? The literature of Europe teems with the sentiments, the ideas, the illustrations, the images, which sprang from a state of society where the aristocratical element predominates.

One who wishes to speak to the American people a language that they will all understand, and sentiments to which their hearts shall answer, must have studied much that the schools of Europe do not teach. With a bold, fearless spirit, a readiness to receive any truth, and to search for it, if need be, in the most hidden places, with a diffusive and strong sympathy for all his brethren, he must speak to them words of truth and soberness.

The more difficult it is to break away from the influences foreign to our system, the greater is the merit in him who does it. Every year, indeed, adds to the number of those who do so.

Every new work by an American writer, writing in the interest and the spirit of American institutions, multiplies the means of an American education. The current of events is stronger than prejudice. If we are not now enough a law unto ourselves, if we judge too much by a foreign standard, if we persist in using the phraseology peculiar to a society to which we are strangers, it will not be so long. Already in the half-century from the day of our independence, we have made great strides in the knowledge and application of the principles which we then promulged.

The progress of society is constantly accelerated, when it takes a new direction from forces which are permanent. Why should we shut our eyes to the conclusions we ought to draw thence? why should we disregard the obvious and necessary consequences of this new state of things in the economy of the world? why persist in applying here the customs and the maxims which belong to Europe?

It is because Leggett rejected the trammels which a false taste and a wrong education impose upon too many minds among us; because he embraced with all his heart the fundamental principle of American institutions, and labored to spread and perpetuate it; because he fearlessly examined, and fearlessly wrote; because he bowed not down to authority, nor masked his opinions—that we praise the character of his mind, as American.

Honored be that character, and many may those be who shall bear it! Bright names there are already who adorn it, few, indeed, in comparison with all that write, but noble pioneers, we trust, of an illustrious company, that shall make glorious our hereafter.

The other remarkable trait which we have mentioned as characteristic of Leggett was his independence—independence of names, of men, of parties. A party man himself, continually laboring to promote the success of that party to which he had attached himself, he, nevertheless, scrupled not to express his opinion freely of their men and their measures. This he did as openly as if he had no connection with them. Trammels he disdained. Dictation from any quarter he despised. His opinions were never concealed. He was above that petty and

mean fear that he might injure his party by expressing his opinions. Probably he never stopped to inquire what might be the effect upon it at all. Truth, sincerity, were the jewels which he valued above all price. He would rather that his party had been disbanded and scattered, than that the mind should have been oppressed by its influence. No man's acts or opinions, because he happened to be of the same party, were safe from the severest examination he could give them. No sanction which party could give, no matter how solemn or universal, could protect any man or any doctrine from his scrutiny; and yet he loved his party. But he loved it as the representative of certain principles, and he loved those principles more. He was what this country particularly demands, an editor who maintained his individual freedom in all circumstances, whatever might be the course which his party took; who loved the right and the truth more than the approval of any man or body of men.

Why should it not always be so? Is there anything in party which renders blind obedience a necessity, and obliges one to surrender his private judgment to the decisions of others? These questions lead us naturally into some inquiry concerning the nature of party, and the foundation and extent of its claims upon us.

This is a subject of the greatest consequence to us. The interests committed to our charge are so vast, and the elective franchise so general, that almost every man has an intimate personal connection with all party questions. The press of our age, and of this country in particular, teems with political writings. The reading of the largest portion of Americans consists almost exclusively of political matter. Politics, or we might better say party politics, have become in our day a tremendous agent in the movements of society. No observer wishing to take a just view of the influences which are affecting the American people, of the forces which propel or agitate them, and not them only, but all the free nations of Christendom, should fail to study closely the origin, nature, uses, and abuses of party.

If a stranger, ignorant of our political institutions, and conversant only with the general character of a civilized and Chris-

tian people, were to come among us during one of our general elections, he would perceive a new element moving society, of which he had before no conception : he would see this society in the most violent commotion, as if agitated by a tempest, and the land filled with complaints, denunciations, and reproaches ; he would see thousands abandoning their usual occupations for the sole business of party politics, and the rest of the people all interested in it, conversing about it, and engaging in it daily ; he would even see those strong natural ties, which unite men in a peaceful state, often broken asunder, and the citizens arrayed against each other, more like enemies than members of the same commonwealth. The phenomenon would arrest his attention ; and how it could have appeared in the bosom of a peaceful state, or be reconciled with the order and sobriety of a republic, would seem to him the profoundest of political problems.

Parties are, nevertheless, inseparable attendants upon free governments. It is vain to expect uniformity of opinion. Human minds are too various, and subject to too many different influences. Scarcely any two minds will come to the same conclusions upon the same facts. Then how few minds reason upon the same facts !—some are not ascertained, or are imperfectly understood. So that what with honest mistakes as to facts, and honest mistakes of reasoning, and the perverse influences, more powerful still, of interest and passion, it is not strange that the world presents an infinite diversity of opinions, and is split into parties, and sects, and factions. Opinions regulate the conduct. If men do not agree in their opinions, no more will they agree in their conduct. Guided by various views, they are ever pursuing different ends, or the same end by different means. Whenever, therefore, large bodies of men participate in the government of a country, they are prone to move in so many different directions that concurrence upon public questions is almost hopeless. So one might have expected, and so history has proved it. There is in all popular governments a tendency to dissension, a tendency strongest in the most popular ; for in such it is the province of all to participate in the management of public affairs, and to sit in judgment upon the conduct of the magistrates.

It is scarcely possible for the business of the State to be conducted in such a manner as to satisfy in any one instance all its members. Each new question, therefore, adds to the number of the dissatisfied, who soon come to outnumber the rest of the people; and it becomes a most difficult problem how to secure the concurrence of a sufficient number of voices to carry on the government in any direction. The first and most natural consequence of this general dissatisfaction is, to beget a desire in a majority of the people—not all, indeed, for the same reason, but, on the contrary, many for the most opposite and inconsistent reasons—to change the public servants, and through them some parts of the public policy.

Whenever the powers of the State are in few hands, it is not so difficult to produce a concurrence of voices, however great may be the real differences of opinion, for their interests lead them to some compromise. This is a matter of little difficulty whenever the subjects of the compromise are the interests of others. It is easier to make rules for the government of others than for ourselves, and the rights of others are not apt to stand long in the way of those who look to their own advantage. The mind may not be convinced, opinions may not be changed; but they are all waived for considerations and equivalents. When, however, the government is in many hands, whose legislation concerns themselves, all whose measures most nearly affect their own rights, and whose interests are the direct subjects of their own legislation, it is very difficult to bring about a concurrence, since, in such case, the sacrifice necessary is one not so much of opinions as of interests. It is for this reason that, in proportion as a representative government becomes more popular, what is called management becomes more difficult. In England, for instance, under the old system, before the passage of the Reform Bill, the management of Parliament, by the means of interest and patronage, was easily accomplished and well understood; but, since the vast increase of the constituency consequent upon that event, it has become a very different and much more difficult matter; and we will venture to predict that the difficulty will continue and increase, and that not only will the influence of the Crown constantly lessen, but that it will be impossible for any government here-

after to command such majorities in Parliament as former governments have done. So it has happened in all other governments; and it may be safely stated, as the testimony of all history and all experience, that, in proportion as the constituency is increased, the sources of disagreement and the chances of dissension are multiplied, and it is made a tenfold more formidable undertaking to carry on any administration or pursue any settled line of policy.

This tendency to diversity of opinion and divided action not only interrupts the harmony of the political body, but it would lead to fatal consequences, to the anarchy and infinite confusion of society, were there not counteracting forces operating to check this centrifugal force. The effects we perceive in those great combinations, with more or less of cohesion, which are called political parties.

The process by which they are formed seems to be this: An individual finds himself alone, powerless. The State is to be governed, not by his private will, but the union of many wills. He may not be able to bring others to adopt his views. Each person has his own, which he cherishes and maintains as earnestly as himself. In this state he falls in with one whose opinions come nearest to his own. In many points which both think important they agree. So far they may be willing to act together, and to postpone the consideration of those about which they differ. A third person is found who in some respects agrees with these two. In like manner a fourth, and so on, till a large body is united upon some fundamental doctrines, some leading ideas. This is a party. Each member forbears to press some of his opinions, that all may unite upon a few principles.

In this manner several parties might be formed in a state. But success and power can be obtained only by a majority, and all these portions therefore would finally melt into two. Where the division between these two should be made, would depend upon the form of the government, or the nature of the institutions. Parties presuppose some government established. Dissatisfaction with the course of the government is the first bond of union. As soon as an opposition is thus formed, those whose opinions or interests incline them to the existing establishment

are found to unite for its protection. Thus the government and the opposition are the first and the most natural divisions. We do not now refer to a struggle for office merely for the sake of office. But we refer to opposition founded upon some principle. In this manner a contest is begun. Each of these antagonist forces employs every power within its reach, one rallying against the government all the dissatisfied and the disappointed, and striving to extend the disaffection still further; the other employing its power and its patronage, and appealing to loyalty and the fear of change, to maintain itself in power. Around these parties great interests are formed; and men soon perceive that antagonist forces have arisen in the State, contending for its control. In the natural order of things, parties, which at first represent only principles, become allied with interests and classes. Then comes a state of things such as we see in the constitutional governments of our times. History in fact teaches us that in all mixed governments—or governments of checks and balances, as they are called—parties become linked with the great interests and classes of a country. Among the Romans, the patricians and the plebeians; in the Italian commonwealths of the middle ages, the Guelphs and the Ghibellines; in the constitutional monarchies of England and France, the representative and monarchical principles; and in America, the Federal and the State authorities, divide and draw to themselves all interests, all suffrages, all opinions.

The reason is obvious. Between the actual administration and the opposition all power is divided. One or the other wields the government, dispenses justice, makes and executes the laws. No law can be enacted, nor measure of policy pursued, but through one or the other. Whoever, therefore, desires to influence the action of the government, whoever feels any concern in its policy, whoever uses his vote with a view to its control, must do so in connection with one party or the other; in other words, must join one of them. That there should be at all times some indifferent persons, whose votes are cast without any general views, or scarce a thought, does not affect the general question. Around these parties, as around a nucleus, will gather all the interests and all classes of the people.



Parties, therefore, are matters of compromise. The members do not all agree, and can not, from the nature of their minds, all agree upon all public questions. Yet these public questions are all to be resolved by the government; and therefore by the action of one party or the other. Every member of a party must submit to see his particular views and preferences, in some, and perhaps in many respects, disregarded or thwarted by the party itself. But this is not just cause of complaint. It is inseparable from party by its very nature, which is a union of many understandings and many wills, agreed upon a few fundamental principles. To these principles, which lie at the foundation of the party itself, each honest member adheres, and has a right to demand adherence in others. Beyond these, his party rights and party duties do not extend. An honorable man is indeed often placed in a most difficult position. Some of the measures of his party he can not approve; but the combinations of parties may be such that, if his party is defeated upon those measures, it will break in pieces. What is his duty in such circumstances? Must he support measures which he dislikes, for the sake of keeping it together? Is it better to defeat the particular measures, at the hazard of the existence of the party, and, of course, the maintenance of its principles, or, by supporting it, preserve its union, its power, and its capacity to maintain its principles, at the sacrifice, however, of his wishes in the particular instances? Such a question, like the question of rebellion against an established government, like the right of revolution, is not to be determined by general rules. Particular and extreme circumstances, necessity, the law of self-preservation, will justify, and little less than these will justify, such a step to a considerate mind. Parties, then, are a necessity. They can not be avoided. With all their good and all their evil, they are indissolubly linked with the destinies of all free states. They are as inseparable from a free state as its freedom itself. Its parties and its freedom perish together. Liable to great abuses, and dreadfully abused in our times, they are undoubtedly; but they have their uses also. Let us compare them.

The first and most obvious of these advantages is this, that it makes the administration of the government a matter

of compromise. It is a great mistake to suppose that a constitutional government is administered altogether in conformity with the wishes of the party in power. The opposition influences its action. A compromise between the opposite principles is made necessary. Parties left to themselves, without checks, would run into extremes. Partisans, like sectarians, tend naturally to become over-zealous, and to exaggerate the advantages of their own, and the dangers of their adversaries' views. They are ever prone, upon theoretical opinions, to make experiments. Some check is therefore necessary, which another party applies. That such a check is serviceable few statesmen will question. Were it otherwise, were the public concerns to be carried along in the track of any one party, the constitution of the government itself would be changed, its mixed character lost, the balance destroyed, the checks removed. If a mixed government be desirable, if a government founded on compromise, balanced and checked by conflicting powers, be most likely to protect the rights and promote the happiness of men, according to the prevalent opinion among the most enlightened nations (and, whether it be or not, is a question we need not now consider), then the existence of at least two great parties is an indispensable condition. Would it have been better for mankind if, during the middle ages, when letters were reviving, when industry was awakening, and towns were springing up, to become afterward free commonwealths and the nurseries of freedom, in the great conflict of those times, that the Pope had overthrown the Emperor, or the Emperor had subdued the Pope, than that there should be the long and uncertain contests which convulsed Italy and Germany, but which, nevertheless, on the one hand, moderated the feudal code, and softened the ferocity of feudal manners, and, on the other, questioned the claims and weakened the authority of the Church, and made it necessary for both parties to consult the people, and concede privileges and charters? Would it have been better for the English people, or any of their descendants, that either the claims of the Crown should have been established and fastened upon them, or that the democratic principles, which have always existed in a portion of the English mind, should have spread through the nation, overshadowed the

Crown, and brought forth institutions all democratic, an unripe fruit, prematurely to fall, than that both should produce, not by unity or concert, but by simultaneous action, that mixed but firmly compacted monarchy under which the whole race flourished so many years, from whose institutions our own have sprung, more developed and more free, and from which a larger liberty is every day coming to the people of England, trained and prepared by time and by experience for its enjoyment and perpetuation?

Another of the uses of party is the scrutiny to which it subjects every magistrate. Man, intrusted with power, should never be left unwatched; for he forgets too readily the purposes for which it was given him, his relations to others, his duty to his country, and the final responsibility to which sooner or later he will be held. But if the eyes of his countrymen are upon him, he is watchful of himself; his accountability is present to his mind. With a strong party, ready to take advantage of his errors, and eager to get possession of his place, circumspection is indispensable; and he is forced to be careful how he ventures to trench upon the rights or authority of others, or to pass the limits of his own.

Nor must we overlook the benefits which result from party rivalry. That there are evils from this source, we shall endeavor hereafter to show; but there is also good. In the struggle for ascendancy, each party appeals to the good acts of which it can boast—to the public burdens lessened—to the interests protected—the industry encouraged—the enterprises undertaken—the treaties concluded—the laws enacted. They run a race for the public favor, and are, as it were, obliged to emulate each other in useful actions. Are we not indebted to this cause for many of those reforms in legislation, and in the administration of the laws, and for many of those useful public works, of which our times make such boast? The philosopher, in his observations of the causes of human happiness, will not forget, nor fail to rejoice, that it should have been so ordered in the course of Providence, that even the bitter strifes of rival parties should beget a contest between them, which should produce the largest amount of benefit to the largest number of the people.

Parties also are useful, as they promote the discussion of public affairs, of the principles of government, and the rights and duties of citizens. In all free states the people must be instructed in the truths to which they owe their freedom. They must know their rights, to be able to maintain them. They can not make useful citizens, and be ignorant of the nature and principles of the government in which they take part; nor can they usefully exercise the rights of electors, when uninstructed in public affairs. What so likely to impart to them this knowledge as the earnest discussions of political parties? Who does not see that beneath the stormy and foaming waves, which the tempest of an election heaves up, there are strong and deep undercurrents of fundamental truths and great principles? Do we not all know, that previous to an election, every topic related to the question, and every argument that human ingenuity can discover, are pressed into the service by able and eager partisans? How many rare truths have been struck out in these conflicts! To this cause how much do we not owe of the political knowledge which is nearly universal in this country? Has not the mind been sharpened and invigorated by these endless discussions? And in England and France has not the prodigious advance in this same knowledge been more owing to the struggles of parties, and the discussions of the press which they have brought forth, than to any other cause whatever?

A political party is an organized body, which can often be turned to account for the noblest purposes. A mere individual can do but little. It is only great bodies of men that can bring about any great result. Nothing can be done without organization and concert. Now, a political party presents such an organization ready at hand, and that organization the most perfect that can be made of any voluntary association. Here are bodies, capable of being wielded for the accomplishment of great ends. All reforms certainly do not fall within the scope of a political party; but there are a great number which do thus fall, all connected with social ameliorations, all relating to the government or the laws (and how wide a range may not these take!), and for the spread of these a party is the readiest and most potent instrument. History is full of examples.

If these were their only consequences, we might consider parties an unmixed good. But there is a reverse to this picture, which has sometimes led good men to doubt whether, on the whole, the good that springs from them be not more than counterbalanced by the evil. The first and most prominent of these abuses is, the perversion of party from generous and patriotic to selfish purposes. Legitimate party springs from differences of opinion. Where there is no difference of opinion, there ought to be no party; there is no sufficient ground for party. But the power and the emoluments of office are great temptations. Under their influences, it is less to be wondered at, than deplored, that men will feign or conceal opinions, convert the means into an end, and clamor for principle, with hearts yearning for office. Principles there may be at the foundation of the party, and many good and true hearts there may be devoted to those principles, and contending only for their sake; but it is, nevertheless, undeniable that, in our day, parties have fallen into great corruption; that there are multitudes, and those, it has ever been remarked, the noisiest and most furious of all, who care nothing for the principles of their party, or indeed for any principles; whose only motive is the hope of gain to themselves—who preach the infamous maxim that “to the victors belong the spoils”—who, on the first success, claim offices for themselves, as the reward of their partisan labors, and drown by their clamors the voices of the moderate and the unobtrusive. In the crowd, and during the struggle, it may be difficult to distinguish the disinterested patriot from the selfish politician. Zeal in the pursuit of one’s private ends is mistaken for zeal in the public cause; the noise of demagogues, sedulous only to promote their own schemes, by making the people their instruments, stuns the ears of quiet persons, and in the enthusiasm of the triumph they leap into the public seats. The number of these persons has come to be so considerable, and their shouts so loud, that the character of parties has been greatly affected by them. They have troubled the waters at the fountain, and the stream runs clear no longer. A class of persons has sprung up, called “professed politicians”—politicians by profession—another name for adventurers, who choose a party only after calcu-

lating the chance of its success, and who watch to turn every event to their own private advantage. A greater calamity can scarcely befall a people than to have in its bosom a large body of such men; and no public demoralization can be more deplorable than such corruption of parties as to convert them into mere combatants for places.

The danger to freedom is one of the most deplorable consequences of this dreadful corruption. Who that is familiar with the history of former commonwealths, weakened and at last torn in pieces by the madness of faction, but must have admitted to his mind, rarely, perhaps, and in his darkest hours, the possibility of our own fair land being oppressed by internal disorders, and torn in pieces by the parricidal hands of her own children? When parties degenerate into factions, and the factions, forgetting the moral principles which are the only safety of the world, sink all questions in the question of success, the country is put at imminent hazard; the vessel of state is driving fast toward the fatal reef, which, though hidden from every eye on board, is shortly to break her, if her course is not changed, into a hundred fragments.

A second abuse of parties is the debasement of the moral sentiments, in regard to the use of means, which in our times they tend to produce. A pure mind is shocked at the first proposal to use immoral or unfair means for the accomplishment of any, the best end. In the transaction of business, among men of fair characters, stratagem or deception is looked upon as dishonest and degrading. Nor is any truth in morals better established, independent of the positive injunctions of Christian ethics, than that dishonest means are never justifiable, even though they were necessary to the attainment of the noblest end—a truth so clear and universal that it has passed into a proverb that “the end never justifies the means.” But in parties are not all these rules practically reversed? When, or rather we would say, how rarely, has it been known that a politician or a partisan has scrupled to use any means whatever that seemed to promise him success? That “all is fair in politics” is a new maxim, ingrafted upon the code of morals under the dictation of partisan leaders. Even high-minded and virtuous men are misled or pushed into consenting to this

wicked doctrine—a doctrine that will, if not checked, find its way from elections and parties to business, trades, and professions. The heat and zeal of the struggle beget indifference to the judgments, not only of a severe morality, but of common probity. The right and the wrong are merged in the question of success. Who, in his quiet hours, can reflect upon the scenes which every election presents, upon the falsehood, gross and monstrous, the libels and the slander, the bribery, direct and indirect, the deception and the intimidation, the appeals to jealousies, prejudices, passions, and fears, the insincere declarations and arguments, put forth with affected earnestness to excite the sober and to mislead the unsuspecting—who can reflect upon all these, and not turn from them with disgust? It is a part of the plan of politicians to keep the country always in a ferment, never to let the people rest, and to rage fiercely themselves so as to infect others by the contagion of their example. What unnecessary alarms, what causeless indignation, what misspent vehemence, are not inflicted upon popular states by these abuses!

The interference of party with the freedom of the individual is another abuse. That is the best government which interferes least with private actions and opinions. The nature of parties requires nothing more than that men should agree upon certain principal questions, waiving others, or rather leaving every member, in respect to those others, free to act as his judgment shall dictate. The abuse seems to consist in an extension of their power and influence to actions and opinions with which they ought not to intermeddle. The whirlpool is so strong as to draw everything within its influence. This is one of the greatest evils of our times, that every question that may be started, every reform that may be proposed, is made a party question, and its fate depends altogether upon the strength of parties. Can anything be worse? Can anything be more demoralizing? If the mind preserves its sense of justice or its love of virtue, in the midst of so many causes to obscure its moral perceptions, we may rejoice for its escape. It is the boast of republics that every man may do whatever is not forbidden by the laws. His actions, so that he does no wrong to others, may be as free as his thoughts. But, under

the present practice, the tendency of parties is to abridge this freedom, and to force every man to govern himself in all things by the will of his party, or, by what is too often the same thing, the will of that party's leaders. This coercion is more or less strong according to circumstances. Pride of opinion, disdain of control, an independent spirit, will always lead many of those who are earnestly devoted to the principles of their party, to resist this universal interference with their actions and opinions. They will assert their undoubted right to speak freely of both measures and men, without either abandoning their party, or submitting to account to it for their conduct. Nevertheless, it requires much moral courage to defy party authority. It is the interest of the leaders to make it disgraceful for a man to separate from his party on any question, and they are sure to let loose upon all such every furious and malignant spirit which they can command.

We have already said that an honorable man may feel himself sometimes obliged to support measures which he does not approve, for the sake of keeping his party together. This evil is increased tenfold by its interference with concerns that should be left to themselves. As you extend the circle of a party's authority, you multiply occasions of real disagreement in opinion, and the oftener do violence to the moral sense and the judgment. That there should ever be occasion to conceal one's real opinions is a positive evil ; but to multiply these occasions is a tyranny in itself, and a degradation to those who bear it.

The present system of party discipline makes an avowed change of opinion embarrassing and difficult. Whoever ventures upon it is pretty sure to be called knave and traitor, as if the thoughts could be confined within fixed limits, or the human mind were stationary. Whoever is most sensible of the weakness of the human understanding, and of the need that we all should use the lessons of experience for the correction of our judgments, is most liable to change his opinions, and the least likely to bear with patience any restraint upon his intellectual and moral freedom. He feels that it is his pride to gather wisdom as he increases in years, and that it would be his disgrace if in no respect the judgment of his riper age were



better than the impulses of his youth. How great, then, is the misfortune, that an almost insurmountable obstacle should be placed in the way of an open change of opinion, and a temptation therefore held out to stifle or misunderstand the voice of our reason! What shall we say of those whose vocation it is to denounce such of their brethren as may have found themselves obliged to disapprove acts of their party, or to leave it, rather than do violence to their sentiments?

The last of these abuses which we shall mention is the despotism which parties are prone to exercise, and which they do in fact exercise, over the minority. The opinion is now very prevalent that the rights of the minority are not adequately protected. Whence does this arise, but from observation of the facts in our own days? There is a disposition to look at the matter in the most favorable view. We do not readily admit that any rights are not among us sufficiently secured. But it is a fact, too apparent to be mistaken, that the whole patronage of government is generally used for party purposes. Nearly one half of the people are industriously excluded from any direct participation in the administration of the government. Who does not see that by this course the rights of not merely the minority, but of the whole people, are violated? They have all a claim to the services of the best citizens in public stations. Offices are trusts for the benefit of the people. A system, therefore, which excludes any of them lessens the number of candidates, and may deprive the country of the services of her best children. But it is not merely the course of administration; the course of legislation is sometimes perverted. Laws have been passed, as party measures, which the minority believed to be hostile to their interests; and we all know that politicians have had few scruples concerning the lengths to which they might go for their party, however prejudicial to their antagonists.

Such are the uses and such the abuses of party. While we preserve the good, it is in our power to mitigate the evil. This is not inseparable from party. It is not so ordered by Providence that liberty must of necessity be followed by this train of evils. The remedy is in our own hands; and this time of comparative quiet, this short season of repose, after the fatigue

and excitement of a hotly-contested general election, may be most fitly devoted to prevent a recurrence of the scenes through which we have but just passed.

This paper has been already extended too far to allow us to develop at this time our views respecting the remedy which we should propose. We may recur to it hereafter. Suffice it for the present to say that the patronage of the government should be diminished; that the action of the State itself should be confined within its appropriate limits, and permitted to interfere less with private concerns; that there should be a juster view of the nature of public office, and a better understanding of the rightful claims of party upon its members.

There must also be an utter rejection of the wicked and detestable maxim that "all is fair in politics." On this point there must be a complete purification of public sentiment, or nothing else can save us. There is not, in the history of all the frauds by which men have been cheated of their happiness, a more fatal maxim than this. If adopted and acted upon, it would convert the partisan into a rogue, and a rogue once is likely to be a rogue always. The right would ever be postponed to the expedient, and the expediency would be the expediency not of an age or of years, but of the moment. Farewell to the peaceful order of former times, to virtuous legislation, to the honest conduct of public affairs, to the purity of private morals, to the heroic sentiment of honor, if this poisonous maxim is suffered to take root in the minds of this people!

There are few men among us who are not, in some sense, party men. The connection may be more or less strict, but the instances are very rare in which it does not exist at all. Some such cases there may be. We have known some studious, busy, or over-sensitive men, who had no party affinities whatever; but they were very few, and they made a great mistake.

Every man, who wishes to have any influence in the political concerns of the country (and who, that soberly reflects on the stake he himself has in the working of our system, does not wish it?), must act with one party or the other. He can not stand aloof, or he will be heard by neither. It is not necessary that he should sacrifice his independence; and, least of all, that

he should compromise his moral principles. On the contrary, he may do much, by his influence with his associates, to moderate their violence and guide their judgment.

All party men have serious duties to perform. To preserve their faith toward their party, and at the same time their self-respect and the purity of their principles, is not always an easy task. Men of honor may well hesitate when the question of separation from a party comes before them. The step is not to be taken without great consideration. Yet there are occasions when such a step is honorable, when not to take it should cover one with dishonor. Every member, as we have shown, is called upon to make some sacrifices of feeling and opinion, in deference to the will of others, just as in a community an individual sacrifices some rights to secure the rest. These sacrifices to party have, however, a limit. They may be made in matters of expediency, but never in those of principle. Slight differences ought certainly not to produce rupture; and a wise man will scarcely separate from his brethren on a question of mere expediency. But a question of principle admits of no compromise.

We all have an interest in mitigating the fierceness of party contests, in quelling the fury of party spirit, in checking its interference with private concerns, in refusing to mere partisans the public stations, and in discontinuing the practice of making every public question a question of party. The rage for office must be abated; men must be placed there for public not party reasons; because they are fit for it, not because they have earned it by partisan labors. All this must be done, and done speedily, if we would preserve to our institutions the health and the beauty of their origin.

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## THE JOURNEY OF A DAY; OR, A SEQUEL OF THE BERKSHIRE JUBILEE.

In the summer of 1844 there was a great meeting at Pittsfield, in the county of Berkshire, Massachusetts, of sons and daughters of the county, as well those who had their homes there, as those who had gone abroad to seek other homes, but had come back to see once more the old homesteads, and rejoice with their still resident brethren at this gathering. Mark Hopkins, President of Williams College, made an address, which gave rise to the following paper, written by Mr. Field in August, 1844.

"Most of us read at school the little poem entitled the 'Journey of a Day.' I have often thought that no more beautiful day's journey could be made than through this county, beginning at Greylock in the morning, and ending with the setting sun at the Eagle's Nest."

Passage from President HOPKINS's sermon at the Berkshire Jubilee.

THIS passage, which we give as near as we can from recollection, fastened itself on our minds, and we resolved to make the journey ourselves. The entire length of the county, from north to south, is fifty miles, and if the ascent of the Greylock was made the evening before, so that the journey should begin from the top at sunrise, it was possible in thirteen hours to pass down through the valley, ascend the Dome of the Taconac, and get a last view of the setting sun from the "Eagle's Nest."

The county, as is well known, covers the western part of Massachusetts, stretching across the entire breadth of the State. Separated from the other counties by the Hoosac chain of mountains, a branch of the Green Mountains of Vermont, and from New York by a branch of the Taconac, it has been until lately very little known, except to its own people. Now, since the opening of the Western Railway, it is on the great highway between Boston and the West, and is as easy of access as any part of the country. At the extreme north and south, stand two gigantic mountains, like sentinels at the gates of the valley, the Greylock on the north and the Taconac on the

south. Between these points, at an average breadth of twenty miles, is spread out one of the finest regions that the sun shines upon; a valley of various aspect, filled with gentle hills—

“Broad, round, and green, that in the summer sky,  
With garniture of waving grass and grain,  
Orchards and beechen forests basking lie,  
While deep the sunless glens are scooped between,  
Where brawl o'er shallow beds the streams unseen.”

Here, too, we venture to say, is American rural life in its best aspect. Here is a hardy population, neither rich nor poor; accustomed to labor, generally intelligent and virtuous, and engaged principally in agriculture. Farmers they are called; but we have never liked that word; it does not express the true condition and character of our freeholding cultivators of the soil. Farmer really signifies a tenant, an intermediate person between the land-owner and the laborer; an inferior to the higher person, the landholder. Neither “farmer,” nor “yeoman,” can be properly applied to our American cultivators and owners of the soil. Land-owner or planter is a better word, and designates more accurately the occupation and character of the man.

The evening before the day fixed for the journey, we passed up from Pittsfield to North Adams, on the eastern side of the Greylock, through the valley of the Hoosac (where, by-the-way, there was rich scenery enough to reward one for a week's labor), and ascended the mountain on the northeast. The ascent was fatiguing enough to make us sleep soundly, though our eagerness brought us up the next morning by day-break, that we might see the sun rise. The morning was clear. The brightest stars were still twinkling in the heavens. The stillness was intense. As we sat upon the observatory, watching the dawn, we heard the beating of our own hearts. There was scarce a breath of air. The trees stood still as if they, like ourselves, were watching for the morning. One after another the stars went out, light streamed up the horizon, the long jagged ridge of the easternmost mountains became distinct, then the tops of the nearer hills, then the valleys, until the sun shot up from behind the great mountain-wall seventy miles off. The effect, as the sun came forth in the clear sky, first

brightening the mountain-tops through the circle of a hundred and fifty miles diameter, then throwing light down their sides and into the valleys, and over the lakes and rivers, was indescribable. If any lover of Nature desires to see her in her most magnificent aspect, let him go to the top of such a mountain as the Greylock and see the sun rise in a clear morning.

The mountain consists of three ridges, running north and south. The middle one is the highest, where stands the observatory, twenty-eight hundred feet above the plain, and thirty-six hundred above tide-water. Vast as is the prospect, the mountain itself, as you look down upon it, is scarcely less striking, with its immense proportions, the sea of forest which swells over it, the dark ravines into which you look, particularly the Hopper, a deep gorge, a thousand feet down. It is frightful to look into. The sweep of the eye from the observatory takes in a tract of not less than fifteen thousand square miles, embracing parts of Massachusetts, Vermont, Connecticut, New York, as far as the Adirondack chain, west of Champlain, and even, it is said, a part of New Hampshire.

Half an hour after sunrise, we left the observatory, and made our way down the mountain. An hour brought us to the valley of Williamstown. This is an irregular valley, walled in by high mountains. The Hoosac comes in at the southeast, and passes off to the northwest, through a part of Vermont, toward the Hudson. In the midst of the valley, there rise three hills, in and around which are the village and the colleges. Imagine three high ridges approaching each other to within four miles, one from the south, another from the west, and the third from the northeast; then three hills in the center of the valley, a bright river coming in from the southeast, winding at the bottom of the central hills, and going out in the opposite direction; then imagine these hills crowned with college buildings, and the white houses of a New England village, and you have Williamstown. It has chanced to us to wander far in our day, and to see many seminaries of learning in our own and foreign lands, but we have never seen one in so beautiful a seat as this.

Williams College has been founded fifty years, and, though from its situation the number of students has not been so great

as at several of our colleges, it has done its full share in nurturing the minds of America. It is not a little to its honor that, with smaller endowments than most others of our colleges, it was the first in this country to build an astronomical observatory. Since then, it has received a princely gift from a gentleman of Boston, an additional means of usefulness, which we know will be well applied.

Williams, the founder, was one of those men whose character and life are of the best example. In his youth he led a seafaring life, which he afterward relinquished, at the desire of his father. In his voyages to England, Holland, and Spain, he acquired graceful manners and useful knowledge, which led him to see the deficiencies of his early education, and to desire to give others better advantages. In the first French war, he was a captain of infantry. After the peace, he was placed in command of Fort Massachusetts, which was established in this valley, and was one of the defenses of New England, before the expulsion of the French from Canada.

On the breaking out of the Seven Years' War, he took command of a regiment, and was ordered to join General Johnson, at the head of Lake Horicon. There on the morning of the 8th of September, 1755, at the age of forty-two, he was killed at the head of the advanced guard, attempting to arrest the assault of the French under Dieskau. The spot where he fell is still pointed out to the traveler, by the road-side. Before night his comrades had avenged his death; for, falling back on the main body, they received and routed the French army. While Williams was absent on this expedition, and a few days only before his death, he made his will, containing the bequest that has given rise to the college.

On the college catalogue are the names of many men who have borne high public trusts. Of such honors, Williams has her full share. But her highest are in the names of Bryant, young Larned, and the missionaries. The missionary undertakings of our day, out of which have come the civilization of the Pacific islands, and so much else of good, were conceived and started here. The place is shown on the banks of the Hoosac, where the first missionaries, then students in the college, concocted and matured their plans. There are not

many places on the globe of more interest to the true philanthropist.

Leaving Williamstown, our road lay along the narrow Green River pass, through South-Williamstown to New Ashford, a thinly-peopled township on the rugged hills that spring from the roots of the Greylock. Out of these hills begins the Housatonic as a babbling brook. To say that the whole of the road was beautiful, would give but a vague idea of it. For the first four miles it lay along the base of the Greylock, with the Hopper in full sight. Then the pass became narrower. The hills were covered with wood; the streams ran chattering over beds of stones, and the grass, still wet with the dew, glistened and threw odors in the air. At New Ashford the level ceased, and the road rose and sank with the hills. The approach of autumn was foretold by its first messenger, the yellow tinge on the leaf of the maple, which peered out from the midst of the summer green, as much as to say, "Autumn is coming."

The last New Ashford hill brought us in sight of Lanesborough, the Lake Pontoosuc, and the valley of the Housatonic, stretching far away to the south. A southerly breeze now sprang up, and bore to us the perfume of new-mown hay and of innumerable flowers. Lanesborough has the aspect of a purely agricultural township. The village is a straggling one, and not attractive, though its situation on the broad, green meadows, and in the face of the southern line of hills, goes far to redeem its other defects. One feature the place has of uncommon beauty, its Lake Pontoosuc, or Shoonkemoonke, as it was sometimes called. It covers some fourteen hundred acres, and its bright water, the road along its margin, and the tall trees that shade it, make you sorry to leave it. We could not stay, and so hastened on to Pittsfield.

What shall we say of Pittsfield, the hospitable, the beautiful? Just fresh from the jubilee—fresh from the open houses and the open hearts of her people—we drove into the village with the scenes of those two days still in our vision. The intervening week vanished. We stood again on Jubilee Hill; we went down to the field, where the feast was spread; we laughed under the old elm; we saw our friends, our fellows, as



goodly a company as we shall see again in many a day. Truly, it was a high festival, worthy to be commemorated, worthy to be repeated.

The valley of the Housatonic here widens to its greatest breadth. Pontoosuc, the Indian name (pity that it had not been retained), signifies *field for deer*. Pleasant place for hunting must the red man have found it; and pleasant, too, for a sojourn is it to the white man. The village is the largest and most flourishing in the county. There are several pretty houses and ornamented grounds, and the general aspect of the place is that of business, thrift, and comfort.

There are four men of the former inhabitants of Pittsfield whose names deserve especial mention: Charles Goodrich, the first settler; Thomas Allen, the first clergyman; Woodbridge Little, and John Brown, the first two lawyers. Goodrich was the *beau-idéal* of an American pioneer. In 1752, at thirty-two years of age, he cut his way for miles through the woods, and drove the first cart and team into the town, then an unsubdued wilderness. Here he settled, cleared the lands, planted fields, and bade others follow him. They did follow, till the land was filled and became a garden. Generations came and passed away under his eye. He lived a patriarch among many children. He saw one revolution and three wars, and, after the last peace, at the age of ninety-six, was gathered to his fathers.

Thomas Allen had been settled as the clergyman of the town twelve years when the Revolution began. His zeal led him at once into the forces. In 1776 he was chaplain at White Plains; and, in the next year, at Ticonderoga. When Burgoyne's invasion became alarming, he put himself at the head of the Berkshire volunteers, and reported himself to Stark, at Bennington. Before daylight, on the morning of the Bennington fight, he addressed that general: "We, the people of Berkshire, have been frequently called upon to fight, but have never been led against the enemy. We have now resolved, if you will not let us fight, never to turn out again." Stark asked, if he wanted to march then, when it was dark and rainy. "No." "Then," replied Stark, "if the Lord should once more give us sunshine, and I do not give you

fighting enough, I will never ask you to come again." The sunshine came, and the fighting too, and well and bravely did that Berkshire band bear themselves. Some of the refugees, it is said, recognized him and said, "There is Parson Allen—let us pop him." When the firing became heavy, he jumped from a rock where he stood, and cried, "Now, boys, let us give it to them!"—saying to his brother, "You load and I'll fire." He was asked if he killed any one. He answered, he did not know; but that, observing a flash often repeated in a bush hard by, which seemed to be succeeded each time by a fall of some one of our men, he leveled his musket, and, firing in that direction, put out the flash.

Woodbridge Little came here as a lawyer in 1766—fourteen years only after the first white man moved into the town, and ten years after the settlement of the first clergyman; pretty good evidence that there was need of legal advice as well as spiritual instruction, as soon as ever the settlements were undertaken. Like many of those iron men, he lived to a great age—seventy-three. His earnings were devoted to the education of clergymen. During his life, he made a large gift to Williams College for that object; and, at his death, more than doubled it.

John Brown came seven years later than Mr. Little. He had been a short time resident at Caughnawaga, New York, where he became acquainted with Sir John Johnson. They took opposite sides in the disputes then ripening between the colonies and England. Brown came to Massachusetts, and was soon employed by the committee of correspondence to go into Canada, to persuade the inhabitants to join the other colonies. He ran many hazards, but found, with Franklin, that the Canadians understood neither their interests nor their rights. After the battle of Lexington, a project was formed in Hartford to get possession of Ticonderoga by surprise. Two officers left Hartford privately, on the 29th of April, 1775, with sixteen unarmed men, and, arriving at Pittsfield, communicated their plans to Brown and two other gentlemen, one of whom was Ethan Allen, who happened to be there. They collected a force of two hundred and thirty Berkshire men and Vermontese, with which they took Ticonderoga on the 19th of

May, and Crown Point immediately after. At the close of the same year he was with Montgomery under the walls of Quebec. In 1777 he was sent to relieve our prisoners at the outlet of Lake Horicon. Traveling all night, he attacked the enemy at daybreak, relieved our own prisoners, made prisoners of two hundred and ninety-three of the enemy, took two hundred bateaux, several armed vessels, and a large amount of property. Soon after, he quitted the Continental service, from dislike to Arnold, to whose character he had formed an unconquerable aversion. Even so early as 1776 he had publicly charged him with levying contributions on the Canadians for his own benefit, and violating his solemn promise of protection given to the inhabitants of Laprairie upon their submission. He said Arnold would prove a traitor, for he had sold many a life for money.

After retiring from the Continental service, Brown was employed by Massachusetts. In 1780 his former acquaintance, Sir John Johnson, with the savage Brandt, desolated Central New York. Brown marched up the Mohawk, with one hundred and eighty men, to the relief of Fort Schuyler. Johnson was devastating the country to the north of the Mohawk. Brown received from his superior an order to attack him, with a promise of support from the rear. He obeyed; the support, owing to some mischance, never came; he was overpowered, and fell, fighting at the head of his little troop, on his birthday, October 17, 1780, at the age of thirty-six. Forty-five of his men fell beside him.

From Pittsfield, a drive of six miles over some gentle hills brought us to Lenox church. For a fine southern landscape, come here: mountain and hill-top, wide-waving wood, broad meadow, and green hill-side, are spread out before you. On a terrace below reposes the village, with the court-house on the crest of the next hill. In this church, two years ago, the 1st of August, 1842, the anniversary of West India emancipation, we listened to Channing's last public discourse. It was here that we heard him utter those stirring words:

"Men of Berkshire! whose nerves and souls the mountain-air has braced, you surely will respond to him who speaks of the blessings of freedom and the misery of bondage. I feel as if the feeble voice which now

addresses you must find an echo among these forest-crowned heights. Do they not impart something of their own power and loftiness to men's souls? Should our Commonwealth ever be invaded by victorious armies, freedom's last asylum would be here. Here may a free spirit, may reverence for all human rights, may sympathy for all the oppressed, may a stern, solemn purpose to give no sanction to oppression, take stronger and stronger possession of men's minds, and from these mountains may generous impulses spread far and wide!"

The clock was striking noon as we descended the Lenox hill, on the road to Stockbridge. Gentle reader, if it ever chance to you to drive from Lenox to Stockbridge, and you will take our advice, be sure you take the Lake Road. You will then pass along the rim of the "Bowl," the prettiest lake in all the country, and you will come upon the village of Stockbridge from the hill behind it, where, as everybody says, is the best view of the river and the "Plain." Come down at midday, as we did, or, what is still better, come an hour before sunset on a summer's day—then say if you ever saw a fairer sight. Take in the whole circle, the Bear Mountain on your left, the tall flinty cliffs of the Monument before you, the exceeding richness of the intervening valley, with one evergreen hill rising in the midst of it, the Housatonic winding and winding again as if it could not or would not find its way out, and tell me if there is a spot in the world where you would sooner bring a wounded spirit to repose, or where you could yourself, after the wearisome struggles of life, more readily possess your spirit in peace. There is nothing here to disturb you. No railway has ever pierced the circle of these hills. There is nothing but deep quietude, the freshness of Nature, and her own sweet voices.

The peculiarity of the scenery of Stockbridge is an endless variety of pleasing pictures. There is not the bold scenery of Williamstown, but wherever you go a sweet scene of rural beauty. The framework and the picture shift with every step you take. Here is a little knoll with a clump of trees; there a nook, half hid, whence a brook utters wild songs, night and day; yonder is a glen, where a mountain has been rent asunder, and vast rocks thrown into the cleft as by the hands of Titans; and over the river there rises a little hill, founded on

rock, and covered with laurel, where the voices of childhood and the laugh of young girls fill the air with gladness.

Stockbridge was originally a missionary station. John Sergeant, missionary to the Indians, was the first white man who set foot within the valley. He came in 1734, making his way through the wilderness from Springfield, and sat down by the wigwams of the Muhhekanews, to teach them the knowledge of God; while Woodbridge, the schoolmaster, whom he brought with him, taught them the rudiments of human learning.

The Stockbridge Indians were the ancient lords of all this country. According to their traditions, their forefathers came from a distant country west by north, crossed over the great waters, and, after many wanderings, arrived at the Hudson. From the Hudson they spread themselves eastward, and named the pleasant river, which they found beyond the Taconac ridges, the Housatonic, that is, *the river beyond the hills*. They called themselves Muhhekanew, which signified *the people of the great waters continually in motion*.

They had become reduced by famine and wars, so that during the mission their average number did not exceed four hundred. They were a brave and faithful people. They received their missionary as their friend, and from that day to this, in all their migrations, they have adhered to him and his successors. They were from that time forward the fast friends of the white man. Their friendship, no doubt, saved the early settlers from many calamities in the French wars. During the Revolution they served faithfully as our allies. In 1775 one of their chiefs thus addressed the Massachusetts Congress:

"Brothers! You remember, when you first came over the great waters, I was great and you were little, very small. I then took you in for a friend, and kept you under my arms, so that no one might injure you. Since that time we have ever been true friends; there has never been any quarrel between us. But now our conditions are changed. You are become great and tall. You reach to the clouds. You are seen all round the world. I am become small; very little. I am not so high as your knee. Now you take care of me; and I look to you for protection.

"Brothers! I am sorry to hear of this great quarrel between you and Old England. It appears that blood must soon be shed to end this quarrel. We never till this day understood the foundation of this quarrel between you and the country you came from. Brothers! whenever I see your blood running, you will soon find me about you, to revenge my brother's blood. Although I am low, and very small, I will gripe hold of your enemy's heel, that he can not run so fast, and so light, as if he had nothing at his heels.

"Brothers! You know I am not so wise as you are, therefore I ask your advice in what I am now going to say. I have been thinking, before you come to action, to take a run to the westward, and feel the mind of my Indian brethren, the Six Nations, and know how they stand; whether they are on your side, or for your enemies. If I find they are against you, I will try to turn their minds. I think they will listen to me; for they have always looked this way for advice, concerning all important news that comes from the rising sun. If they hearken to me, you will not be afraid of any danger from behind you. However their minds are affected, you shall soon know by me. Now I think I can do you more service in this way, than by marching off immediately to Boston, and staying there. It may be a great while before blood runs. Now, as I said, you are wiser than I. I leave this for your consideration, whether I come down immediately, or wait till I hear some blood is spilled.

"Brothers! I would not have you think, by this, that we are falling back from our engagements; we are ready to do anything for your relief, and shall be guided by your counsel.

"Brothers! One thing I ask of you, if you send for me to fight, that you will let me fight in my own Indian way. I am not used to fight English fashion; therefore you must not expect I can train like your men. *Only point out to me where your enemies keep, and that is all I shall want to know.*"

They kept their word. At the very breaking out of the war they acted as rangers in the vicinity of Boston, under Yokun, one of their tribe. A full company, under another chief, named Nimham, was at White Plains, where they suffered severely both in the battle and from sickness.

In 1785 and 1788 the remnant of the tribe removed to a township in New York, given to them by the Oneidas. Here they resided with the missionary till 1822, when they began their removal to Green Bay. Now and then a pilgrim comes back to visit the graves of his ancestors. If the descendants of the white man, whom the Muhhekanews befriended, could know how much they owe them, no wrong would ever be done them. Peace and prosperity go with these simple-hearted red-men!

Sergeant lived among them fifteen years, instructing and walking with them as their friend and guide. Of a Sunday evening, in the summer, after the church service, he would remain conversing with them in the most familiar manner. He died in 1749 at the age of thirty-nine. His successor was Jonathan Edwards, who here wrote the greatest metaphysical work of which America can boast.

If there ever was a country laid in the lap of beauty, it is here. Not only in this valley, but for twenty miles around it, Nature has been munificent of her gifts. Take Stockbridge as the center, and make excursions from it in any direction you please, you will find enough for a voyage across the sea. Come in June, when the laurel is in blossom; come in August, when the luxuriance of summer is at its height; come in October, when the thousand hues of our unequaled autumn are crowning every hill and every woodland; come here, and visit at your leisure Deowkook, the Monument, the Bear Mountain Glen, the sequestered Paquanhook, the Ice Glen; take a row on the Housatonic; penetrate the woods to Hatch's Pond; ride round the Mohawk Lake; sail on the Bowl; or go farther and visit the Green Water of Becket, or the charming lakes of Otis; or the wild scenes of Tyingham; or the twin lakes of Salisbury; or the falls of the Housatonic; or the Taconac, Dome and Falls; forget the cares of the busy world, and—be happy.

Seven miles more, and we entered Great Barrington, known to theologians as the home of Samuel Hopkins, the founder of a new school of theology, and better known to us as once the home of Bryant. Ma-hai-we the Indians called it, signifying *down*, that is, underneath the "Monument." Your way hither

is along the base of that mountain-wall, from whose top, if you will diverge a little, you shall see a sight that shall charm you. But you shall think less of its wall of rock, or its wide prospect, than of its old romance.

“ . . . There is a precipice  
That seems a fragment of some mighty wall,  
Built by the hand that fashioned the old world,  
To separate its nations, and thrown down  
When the flood drowned them. To the north, a path  
Conducts you up the narrow battlement.  
Steep is the western side, shaggy and wild  
With mossy trees, and pinnacles of flint,  
And many a hanging crag. But to the east,  
Sheer to the vale go down the bare old cliffs,  
Huge pillars, that in middle heaven upbear  
Their weather-beaten capitals, here dark  
With the thick moss of centuries, and there  
Of chalky whiteness where the thunderbolt  
Has splintered them. It is a fearful thing  
To stand upon the beetling verge, and see  
Where storm and lightning, from that huge gray wall,  
Have tumbled down vast blocks, and at the base  
Dashed them in fragments, and to lay thine ear  
Over the dizzy depth, and hear the sound  
Of winds that struggle with the woods below,  
Come up like ocean murmurs. But the scene  
Is lovely round; a beautiful river there  
Wanders amid the fresh and fertile meads,  
The paradise he made unto himself,  
Mining the soil for ages. On each side  
The fields swell upward to the hills; beyond,  
Above the hills, in the blue distance, rise  
The mighty columns with which earth props heaven. . . .

There is a tale about these gray old rocks,  
A sad tradition of unhappy love,  
And sorrows borne and ended long ago,  
When over these fair vales the savage sought  
His game in the wild woods.”

Gentle Ma-hai-we, leafy, almost hid behind the elms, fit home is it for a poet. The valley is compressed to its narrowest size, leaving barely room for the river and the village street beside it.



Instead of following the road to Sheffield, the southernmost and the oldest town in the county, we turned westward into the Egremont road, in order to ascend the Taconac. Three miles brought us to the neat little village of Egremont, and two more to Guilder Hollow, when we turned into one of the gorges of the mountain. Here we found a tolerable road, made along one of the streams, and followed it eight miles.

The Taconac is an immense pile, advanced into the valley of the Housatonic, and terminating a chain that stretches from the Highlands of the Hudson to the northeast. Its shape is remarkable: there is an exterior ridge, nearly straight on the eastern side, and semicircular on the others, from which rise several peaks at intervals, like towers from a battlement. Within this exterior wall is a large plain, cultivated and inhabited, constituting the township of Mount Washington. The people were now in the fields gathering in their hay. We envied them their summers, passed in this elastic atmosphere, whatever we might think of their winters. The air was ethereal, and the thin, white clouds sailed past so near to us that it seemed as if we might almost throw a stone into them. But to the Dome.

From the center of the eastern ridge a single peak rises higher than all the rest by several hundred feet, shaped like a dome. Its highest point is twenty-six hundred feet above the valley. We left our wagon in the road, and walked a mile or so by an easy path through the woods to the base of the Dome. Here the scramble began, and a hard one it was, up a steep, rocky path, among the whortleberries and stunted pines. Half an hour sufficed for it, however, and we then found ourselves on a platform of bald rock, lifted far into the air above everything around us—everything, indeed, nearer than the Greylock and the Catskills. The first exclamation of "Oh, how grand!" was followed by long, silent gazing on the magnificent panorama. It is not so vast as that of the Greylock, but more beautiful, because the country around it is richer.

The Catskills, of course, bounded the horizon on the west, and the intervening country lay beneath us like a garden. We thought we could trace the Hudson, a bright line, at the foot of the mountains. And there, on the north and east, lay

Berkshire. All its fair scenes, from the Greylock hither, were spread out as on a map—its fifty lakes, its hills, and its rejoicing river. And close beneath us, to the south, lay the twin lakes of Salisbury, two gems. But words can not give you what the eye takes in. Come and see.

In the eastern ridge, four miles from the Dome, is a narrow gorge, where a mountain-stream leaps down and makes the Falls of the Taconac. The inhabitants call them the Bashbish, or simply the Bash. We prefer calling them the Falls of the Taconac. We drove rapidly across the plain, and then walked a mile and a half to the falls. It is not so much the fall of water, as the wild sublimity of the gorge, that will strike you. The mountain is rent, and the stream rushes down the cleft among the fallen rocks, in successive leaps, which are in all, perhaps, a hundred and fifty feet. On one side the rock projects twenty-five feet over the fall, a dark, frowning mass of rock, nearly two hundred feet high, where the eagles used to build, and hence called the "Eagle's Nest." From the edge of this cliff you may stretch forward and look down into the gulf below—a dizzy height—and you may look westward, over the whole country between you and the Catskills. Here we stood, looking at the long blue line of mountain, as the sun went down behind it, and so ended our "journey of a day."

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## THE ATLANTIC TELEGRAPH CABLE.

On the 5th of August, 1858, the first Atlantic telegraph cable was laid. The event was celebrated on the 1st of September following, under the direction of the Common Council of the city of New York. Mr. Field was chosen the orator for the occasion, and delivered the following address before a vast assemblage in the Crystal Palace.

LADIES AND GENTLEMEN: When Morse discovered the applicability of electricity to the communication of intelligence, it might have been foreseen that the limits of the application were to be measured only by the power of stretching the electric wire, and of transmitting through it the electric current. It occurred, no doubt, to different minds that the telegraph would one day be carried across the ocean and around the globe; and, for aught I know, plans may have been formed for doing the work. I have been requested to give you the history—a condensed epitome it must be—of the first success—the first attempt, and, I might add, the first practicable plan, in the development of this great idea of an ocean telegraph. My connection with the undertaking from its commencement—my position as counsel for those who have done the most to carry it through—have made it appear to others fitting that I should perform this service. In its performance I trust that I shall say nothing unbefitting my personal relations to any of the actors. I am not here to praise, but to relate.

Two years previous to 1854 there had been incorporated by the Legislature of Newfoundland a company by the name of the Newfoundland Electric Telegraph Company, the purpose of which was to connect by telegraph that island with the main-land of America. A telegraph across the ocean was not a part of the scheme. It contemplated a connection with Europe by means of steamers plying between Newfoundland and Ireland.

This company proceeded a little way and failed, leaving a debt of some fifty thousand dollars, due chiefly to laborers.

In this emergency, and some time in February, 1854, Mr. Horace B. Tebbetts and Mr. Frederick N. Gisborne, officers then of that company, applied to Mr. Matthew D. Field to help raise additional funds by a sale of bonds or stock. The gentleman thus applied to came to Mr. Cyrus W. Field and myself. We had several conversations together on the subject. Then it was that the thought of extending the line across the Atlantic suggested itself. Mr. Cyrus W. Field wrote to Lieutenant Maury to inquire about the practicability of submerging a cable, and consulted Professor Morse about the possibility of telegraphing through it. Their answers were favorable.

On receiving them, it was agreed between Mr. Cyrus W. Field and myself that, as nothing could be done under the charter of the Newfoundland Electric Company, we would endeavor to form a new company, to take a surrender of the charter of the former company, purchase its property, pay its debts, and obtain another charter to effect a direct telegraphic communication with Europe. The first step was to procure the coöperation of a few persons whose character and resources would be a guarantee that the work had been undertaken in earnest. Four men were invited, whose names you all know—Peter Cooper, Moses Taylor, Marshall O. Roberts, and Chandler White. They met Mr. Cyrus W. Field and myself at his house, where, around a table covered with maps, plans, and estimates, the subject was discussed for four successive evenings, the practicability of the undertaking examined, its advantages, its cost, and the means of its accomplishment. The result of the conference was the agreement of all the six gentlemen to enter upon the undertaking. Mr. Cyrus W. Field, Mr. White, and myself were to proceed to Newfoundland to procure a charter and such aid in money and privileges as the government of that island could be induced to give. The agreement with the Electric Telegraph Company, and the formal surrender of its charter, were signed on the 10th of March, and on the 14th we left New York, accompanied by Mr. Gisborne. The next morning we took the steamer at Boston for Halifax, and thence, on the night of the 18th, departed in the little steamer *Merlin* for St. John's, Newfoundland.

Three more disagreeable days' voyage scarcely ever passed than we spent in that smallest of steamers. It seemed as if all the storms of winter had been reserved for the first month of spring. A frost-bound coast, an icy sea, rain, hail, snow, and tempest, were the greeting of the telegraph adventurers in their first movement toward Europe. In the darkest night, through which no man could see the ship's length, with snow filling the air and flying into the eyes of the sailors, with ice in the water, and a heavy sea rolling and moaning about us, the captain felt his way around Cape Race with his lead, as the blind man feels his way with his staff, but as confidently and as safely as if the sky had been clear and the sea calm; and the light of morning dawned upon deck and mast and spar, coated with glittering ice, but floating securely between the mountain gates of the harbor of St. John's.

In that busy and hospitable town the first person to whom we were introduced was Mr. Edward M. Archibald, then Attorney-General of the colony, and now British Consul in New York. He entered warmly into our views, and from that day to this has been an efficient and consistent supporter of the undertaking. By him we were introduced to the Governor (Kerr Bailey Hamilton), who also took an earnest interest in our plans. He convoked the Council to receive us and hear an explanation of our views and wishes. In a few hours after the conference the answer of the Governor and Council was received, consenting to recommend to the Assembly a guarantee of the interest of fifty thousand pounds of bonds, an immediate grant of fifty square miles of land, a further grant to the same extent on the completion of the telegraph across the ocean, and a payment of five thousand pounds toward the construction of a bridle-path across the island, along the line of the land telegraph.

Mr. Cyrus W. Field thereupon, on the 25th of March, took the return steamer from St. John's, on his way to New York, in order to fit out a steamer for the service of the company, while his two associates remained in Newfoundland to obtain the charter and carry out the arrangements with the former company. They continued there nearly five weeks, during which, after many discussions and negotiations, the charter was at length

obtained, and the fifty thousand dollars of debt of the old company were thereupon paid.

The charter was liberal and provident. After declaring that it was "advisable to establish a line of telegraphic communication between America and Europe, by way of Newfoundland," it incorporated the associates for fifty years, established perfect equality in respect to corporators and officers between citizens of the United States and British subjects, allowed the meetings of the stockholders and directors to be held in New York, or in Newfoundland, or in London, conceded the exclusive right to establish a telegraph from the continent of America to Newfoundland, and from Newfoundland across the ocean, granted fifty square miles of land, and further provided that, "so soon as the said company shall have actually established a communication across the Atlantic Ocean, by means of a submarine cable or wire from this island, the said company shall receive from the government of this island a grant of fifty square miles of ungranted and unoccupied wilderness land, to be selected by the said company, in addition to the grants hereinbefore mentioned"—a provision subsequently extended so as to permit the company to establish the communication by an auxiliary or associate company.

It were long to tell how the government and people of Newfoundland nurtured this enterprise in its commencement, how they have stood by it, through its various fortunes, till its triumphant consummation. That vast island, projected into the North Atlantic, lifting above the sea its cliffs of everlasting and immovable rock, beckoning, as it were, to Europe, seems framed by Providence for one of the pillars of that cable which is to bind the continents together. Its broad interior, baffling the explorer, its cold and gloomy morasses, its dark and frowning headlands, its deep and tranquil bays, and harbors innumerable, take not such hold of the imagination as its support of that wondrous line which, lost for ever to human eyes, is to be the highway of thought between the Old World and the New.

Take the map, and see where the civilized portions of the two hemispheres approach nearest to each other: two islands stand there face to face. The highlands of Trinity answer to

the highlands of Valentia. Between them rolls the stormiest sea of all the world save one. It is the gateway through which pass the icebergs from the Pole. Once a year, and sometimes for forty days together, a continuous field of ice moves down from the north at the rate of two or three miles an hour. But far beneath there is tranquil water and an even surface. The plummet has sounded all that sea, and found, at an average depth of about two miles, a nearly level bottom covered with the smallest sea-shells, which must have been deposited in the lapse of ages and fallen through the still water as the snow falls through the still air.

In the early part of May the two gentlemen who had remained behind in Newfoundland rejoined their associates in New York, and there the charter was formally accepted and the company organized. As all the associates had not arrived till Saturday evening, the 6th of May, and as one of them was to leave town on the morning of Monday, it was agreed that we should meet for organization at six o'clock of that day. At that hour they came to my house, and, as the first rays of the morning sun streamed into the windows, the formal organization took place. The charter was accepted, the stock subscribed, and the officers chosen. Mr. Cooper, Mr. Taylor, Mr. Field, Mr. Roberts, and Mr. White were the first directors. Mr. Cooper was chosen president, Mr. White vice-president, and Mr. Taylor treasurer. Thus was inaugurated that great enterprise whose completion we celebrate to-day. The plan was formed, the arrangements made, and the work begun. What followed was the execution of the great design.

From the 8th of May, 1854, to the 5th of August, 1858, there passed scarcely four years and three months; but they were as fruitful of anxiety and toil as of successful results. The land line across the island of Newfoundland—upward of four hundred miles—was first to be made. This was a work of incredible labor. The country was for the most part a wilderness of rock and morass; "a good and traversable bridle-road eight feet wide," with bridges of the same width, had to be made the whole distance; materials and provisions had to be transported first from St. John's to the heads of the different bays on the southern coast, and afterward chiefly on men's

backs to the line of road. The first year Mr. White, as vice-president, directed in person the operations; the second and third year superintendents were sent down. In addition to the land line in Newfoundland, another of one hundred and forty miles in Cape Breton was constructed, and contracts made with companies in Nova Scotia, New Brunswick, Maine, New Hampshire, Massachusetts, Connecticut, and New York, to connect their lines with the Newfoundland line. Then there was the submarine line between Newfoundland and Cape Breton, eighty-five miles in length, and another thirteen miles long, across Northumberland Straits, to Prince Edward Island. To procure these, Mr. Cyrus W. Field visited England twice—once in December, 1854, and again in January, 1856. The first attempt to lay the submarine line across the Gulf of St. Lawrence was made in 1855, and was unsuccessful. A second attempt, made the next year, succeeded. Thus was completed the chain of telegraph from New York to the eastern coast of Newfoundland, and the projectors now stood upon the shore of the Atlantic in their progress eastward.

The whole expense thus far, with very trifling exceptions, had fallen upon them; Mr. Cyrus W. Field having made the largest contributions—amounting to more than two hundred thousand dollars in money—and Mr. Cooper, Mr. Taylor, and Mr. Roberts each a little less. No other contributors beyond the six original subscribers had come in, except Professor Morse, Mr. Robert W. Lowber, Mr. Wilson G. Hunt, and Mr. John W. Brett. The list of directors and officers remains to this day as it was at first, except that Mr. Hunt, as director, has taken the place of Mr. White, who died in 1856, and that Mr. Field is vice-president, and Mr. Lowber secretary. In all the operations of the company, thus far, the various negotiations, the plan of the work, the oversight of its execution, and the correspondence with the officers and others, mainly devolved upon Mr. Cyrus W. Field.

The greatest and most difficult part of the original design still remained to be executed, and that was the submarine cable from Newfoundland to Ireland. The distance was one thousand nine hundred and fifty statute miles; the sea was stormy and uncertain; no submarine line of more than three



hundred miles had then been attempted. In anticipation of the task now to be undertaken, Mr. Field, on his first visit to England, in 1854, had invited manufacturers to furnish him with specimens of cable which they would recommend, and estimates of its cost, and he had entered into correspondence with various persons on the subject. In 1856 he procured an order from our Government, under which Lieutenant Berryman made soundings of the Atlantic between Newfoundland and Ireland. Lieutenant Berryman sailed on that service on the 18th of July, and the next day Mr. Field sailed for England, having received the formal authority of the company to make arrangements in England for the submarine line, either by a subscription to this company or by organizing a new company as auxiliary or associated with this. In England he had invited the coöperation of Mr. Brett, a gentleman of great experience, who in 1851 formed a company which had laid the first submarine cable from England to France. He afterward brought in Mr. Edward O. W. Whitehouse, electrician, and Mr. Charles T. Bright, engineer—both gentlemen of high scientific attainments. These four gentlemen, on the 29th of September, 1856, entered into a formal agreement to use their exertions for the formation of a new company, to be called the Atlantic Telegraph Company, the object of which should be "to continue the existing line of the New York, Newfoundland and London Telegraph Company to Ireland, by making, or causing to be made, a submarine telegraph cable for the Atlantic." This done, Mr. Field issued, on the 1st of November, 1856, a circular, signed by him as Vice-President of the New York, Newfoundland and London Telegraph Company, from which I can not forbear making the following extracts:

"In April, 1854, a company was incorporated by act of the Colonial Legislature of Newfoundland for the purpose of establishing a line of telegraphic communication between America and Europe. That government evinced the warmest interest in the undertaking, and, in order to mark substantially their sense of its importance and their desire to give to it all the aid and encouragement in their power, they conferred upon it, in addition to important privileges of grants of land and subsidy, the sole and exclusive right of landing a telegraphic line on the shores within their jurisdiction, comprising, in addition to those of Newfoundland, the whole

Atlantic coast of Labrador, from the entrance of Hudson Strait to the Straits of Belle Isle.

"This act of the Colonial Legislature was subsequently ratified and confirmed by her Majesty's government at home. The company also obtained, in May, 1854, an exclusive charter from the government of Prince Edward Island, and afterward from the State of Maine, and a charter for telegraphic operations in Canada.

"The exclusive rights absolutely necessary for the encouragement of an undertaking of this nature having thus been secured along the only seaboard eligible for the western terminus of an European and American cable, the company in the first instance commenced operations by proceeding to connect St. John's, Newfoundland, with the widely ramified telegraph system of the British North American provinces and the United States.

"This has been recently completed by the submersion of two cables in connection with their land lines—one, eighty-five miles in length, under the waters of the Gulf of St. Lawrence, from Cape Ray Cove, Newfoundland, to Ashpee Bay, Cape Breton; the other, of thirteen miles, across the Straits of Northumberland, connecting Prince Edward Island with New Brunswick. Electric communication is thus established direct from Newfoundland to all the British American colonies and the United States. On the Irish side lines of telegraph have been for some time in operation throughout the country, and are connected with England and the Continent by submarine cables. The only remaining link in this electric chain required to connect the two hemispheres by telegraph is the Atlantic cable. The New York, Newfoundland and London Telegraph Company, being desirous that this great undertaking should be established on a broad and national basis, uniting the interests of the telegraph world on both sides of the Atlantic, have entered into alliance with persons of importance and influence in the telegraphic affairs of Great Britain; and, in order at the same time to obtain the fullest possible information before entering upon the crowning effort of their labors, they have endeavored to concentrate upon the various departments of the undertaking the energies of men of the highest acknowledged standing in their profession, and of others eminently fitted for the work, who were known to have devoted much time and attention to the subject."

After detailing the results of the investigations, the circular proceeded :

"All the points having a direct practical bearing on any part of the undertaking have thus been subjected to a close and rigid scrutiny, the result of this examination proving to be in every respect of the most favorable character. It remained only that those possessing the required power should take the initiative. The New York, Newfoundland and London Telegraph Company, possessing, in virtue of their charter, all the

necessary powers, deputed their vice-president to visit England in the summer of the present year, and they gave him full authority to make, on their behalf, such arrangements as should seem to him best fitted to carry forward the great work. The outline of the formation of the Atlantic Telegraph Company, which will be found in the appendix, will sufficiently explain the nature of these arrangements."

Without waiting for the formation of the new company, Mr. Field, on behalf of the Newfoundland Company, made application to the British government for its aid in ships and money, and received, on the 20th of November, a letter from the Treasury, which I am tempted to read, promising ships to assist in laying the cable, and a fixed yearly sum in payment for government messages. He also personally solicited bankers and merchants in London for subscriptions, and, with Mr. Brett, visited Liverpool and Manchester to address public meetings. He subscribed £100,000 toward the capital of £350,000, and Mr. Brett followed with a subscription of £25,000. A day or two after the Treasury letter was received the subscriptions were closed, when it was found that the applications for stock exceeded the capital by about £30,000; so that on the final allotment Mr. Field had eighty-eight shares, of one thousand pounds each, and Mr. Brett twelve. To show the feeling which had been excited in England, it is worth mentioning that many persons subscribed for shares, not for profit, but that they might have a part in the undertaking, and among others Mr. Thackeray and Lady Byron.

Too much praise can not be awarded to the English government and people for the zeal with which they came forward in answer to the call made upon them. Money was obtained from individuals as freely as it was wanted, and the government outran the people.

Returning then to America, Mr. Field, with his American associates, made application to the Government of the United States for aid similar to that given by the English government, and he also applied to individuals for a participation with him in the stock he had taken. Congress voted the aid requested, after a vehement opposition, against which the measure was carried in the Senate by a majority of one. Of the stock, twenty-seven shares were taken in the United States.

All things being now ready, the first attempt to lay the cable was made, as you all know, in August, 1857. There had been assembled in the harbor of Valentia three ships of the English and two of the American navy. There was the *Agamemnon*, recent from the fires of the Crimean War; she had borne the flag of the English admiral over the waters of the Euxine; she had now laid her armament aside, and taken the burden of half that coil, for the laying of which she will be hereafter more famous than if she had forced the harbor of Sebastopol. There was the *Niagara*, the largest ship of our navy, made for the heaviest cannon of naval warfare, her armor never yet put on, but laden instead with the American half of the precious burden. There were the two attending ships, the *Leopard* and the *Susquehanna*, and the *Cyclops*, surveying-ship, just returned from the verification of Lieutenant Berryman's soundings. The Lord-Lieutenant of Ireland had come to wish them "God speed" in the name of his sovereign and her people. Everything promised success, and as the great ships moved out of the harbor the highlands of Valentia shone brightly in the morning sun, while behind them the grand old mountains about Killarney, towering above the lakes—those miracles of beauty—appeared to smile and beckon the ships westward; for, to the excited imagination, it seemed as if the inanimate mass were conscious of the great act about to be performed, and looked impatient toward the west, which it had faced in silence since the world began, but to which it was soon to speak in tones inaudible to human ears, yet signifying the thoughts and wishes of men.

The expedition thus prosperously begun was, however, doomed to sudden disappointment; for, on the fourth day out, the cable parted, and the ships made their way to England. The undertaking being thus suspended for the year, Mr. Field returned to America. He was soon, however, recalled to England to assume the management of the enterprise. Arriving in that country on the 16th of January, he was, on the 27th of the same month, appointed the general manager—an appointment which he accepted without compensation; and, by a subsequent resolution, every person in the employment of the company was placed under his control.

The precise share which each person had hitherto borne in the great undertaking is easily measured by the narrative which I have given. The directors of the company, in their report to the stockholders on the 18th of February last, thus state the share of one of them :

"The directors can not close their observations to the shareholders without bearing their warm and cordial testimony to the untiring zeal, talent, and energy that have been displayed on behalf of this enterprise by Mr. Cyrus W. Field, of New York, to whom mainly belongs the honor of having practically developed the possibility, and of having brought together the material means for carrying out the great idea, of connecting Europe and America by a submarine telegraph.

"He has crossed the Atlantic Ocean no less than six times since December, 1856, for the sole purpose of rendering most valuable aid to this undertaking. He has also visited the British North American colonies on several occasions, and obtained concessions and advantages that are highly appreciated by the directors ; and he has successfully supported the efforts of the directors in obtaining an annual subsidy for twenty-five years from the Government of the United States of America, the grant of the use of their national ships in assisting to lay the cable in 1857, and also to assist in the same service this year ; and his constant and assiduous attention to everything that could contribute to the welfare of the company, from its first formation, have materially contributed to promote many of its most necessary and important arrangements. He is now again in England, his energy and confidence in the undertaking entirely unabated ; and at the earnest request of the board he has consented to remain in that country for the purpose of affording to the directors the benefit of his great experience and judgment, as general manager of the business of the company connected with the next expedition.

"This arrangement will doubtless prove as pleasing to the shareholders as it is agreeable and satisfactory to the directors."

Everything being now ready for the second trial, which it was determined to begin—not at the shore, but in mid-ocean—the squadron departed from Plymouth on the 10th of June. It consisted of the *Agamemnon* and *Niagara* to lay the cable, and the *Valorous* and *Gorgon* (both English) as attendant ships, the *Susquehanna* being kept away by the yellow fever, which had broken out on board, and the *Gorgon* taking her place, while the *Valorous* took the place of the *Leopard* of the previous year. The officers and crews of these vessels were picked men. Captain Preedy of the *Agamemnon*, and Captain Hudson of the *Niagara*, are as accomplished and gallant command-

ers as ever trod the quarter-deck; and Captain Dayman in the Gorgon, and Captain Aldham in the Valorous, fitly represented the spirit and honor of the English navy. Then, what a company was there of engineers and electricians! I need only name Mr. Everett, to whose genius the paying-out machinery was due, Mr. Bright, Mr. Woodhouse, Mr. Canning, and Professor W. Thompson, to show that everything was provided which science and experience could suggest. Stately ships, illustrious company, and a richer freight than ever filled the argosies of Spain, when Spain was mistress of the Indies.

On the open sea they found not that calm weather which they had been led to expect, but violent storms. A hurricane saluted them on their approach to mid-ocean. They gained, however, on the 26th of June, the point desired, spliced the cable, and steered in opposite directions. The cable parted after about five miles had been paid out. They returned and made another splice on the same day, and started again. A second time the cable parted, and about seventy miles more were lost. Nothing daunted, they returned and made a third splice. All went well until two hundred and sixty miles more had been laid in the sea, when another break occurred, and the ships, according to the preconcerted arrangement, returned to Queens-town.

Anxiously had they been expected at Valentia, from whose headlands eyes were strained every day to catch the first glimpse of the returning Agamemnon rising out of the western horizon. I have it on good authority that the Queen was waiting for the signal to go herself and receive the cable. Would it not have been an admirable sight to see that illustrious lady, the foremost woman of all the world, sovereign of so many lands, the heir of the kings of our forefathers, receiving from her gallant seamen that line which was to repair with material better than allegiance the broken chain which once bound together the Anglo-Saxon-Celtic races in every quarter of the globe?

The ships being returned, the directors were summoned to meet in London. This was the time to try the fortitude of men. It was the agony of the enterprise. If it had been abandoned then, who can tell when it would have been resumed? The meeting of the directors took place on the 14th of July,

and then the fate of the undertaking was decided. There were sixteen acting directors; of these, six were absent; another, the vice-chairman, was so dissatisfied with the proposal to make a third trial that he left the room. The remaining nine, after an earnest debate, resolved, unanimously, to repeat the effort. From that moment the tide turned.

Perhaps some of these courageous nine feared that the third attempt would prove as disastrous as the first and second, but they thought that it ought, nevertheless, to be made; perhaps there were others who expected the success which followed. But could the veil have been lifted from six weeks of the future, how would they have been moved by that which we have witnessed—the swelling emotion, the glad faces, the public rejoicings, which have greeted the victory! They expected, of course, that, when the line was once laid, messages would pass to and fro with instantaneous rapidity; but, however much men may dream of it, the actual occurrence will startle them. Within forty-five days after that meeting of the directors news came to London that the Chinese Empire, reversing its traditional policy, and breaking through the prejudices of ages, had made peace with England and France, opening its doors to European intercourse, and, of course, to European culture, but, above all, to the Christian religion. The good news was instantly known in the Western hemisphere. The imagination is baffled when it tries to picture the journey which the message made. When it left London, evening had already come; but it overtook and passed the shadow of the earth, as if that were but a creeping snail, though making daily the circuit of the globe; it darted through the green valleys of England, over Scotch mountains, down beneath the channel to the Irish coast, thence through Ulster and Connaught and Munster to the shores of the Atlantic. Here it dived beneath the ocean, deeper than the valley of Chamouni lies below the summit of Mont Blanc, passing under great ships of commerce and of war, and in an instant arose at the cliffs of Newfoundland; then, quicker than thought, it passed over the morasses and mountains to the Gulf of St. Lawrence, then on through the gulf, through Nova Scotia, New Brunswick, and the Eastern States, to our own doors.

But let us return from this digression to the last expedition. On the 17th of July the squadron departed from Queenstown for the third time. As they passed Cape Clear, into the Western Ocean, they parted company; but such is the accuracy of modern navigation, that, though there was no earthly map or mark to guide them, yet steering by the compass and the celestial signals, one after the other all arrived at the appointed rendezvous in mid-ocean.

On the 29th of July the two great ships took their places a short distance from each other. A strong hawser fastened them together. The end of the cable which the Niagara bore was carried to the Agamemnon and there spliced to the end of hers; it was then lowered into the sea, and the ships moved, each toward its own country, at first creeping slowly till the cable had sunk far down, and then faster, to a speed of five or six miles an hour.

Let us glance for a moment at the Agamemnon on her homeward track. She suffered severe weather, and more than once the cable was in extreme peril. Once, in order to remove a defect in the coil, it was necessary to stop the ship—an operation the most dangerous, for the experience of the two former trials had shown that the insatiable sea will neither give back what it has received nor allow the supply to cease. But a good Providence watched over the ship, and on the 5th of August she came safely to land.

Let us now return to our own Niagara and her faithful attendant. The Gorgon, herself a ship of eleven hundred tons, though but a boat by the side of the Niagara, led the way, because the compasses of the latter were affected by the cable, and the great ship followed close behind. Never was navigator more vigilant and more successful than Captain Dayman. His observations went on by day and by night; as one heavenly body went down and another arose, his instruments were turned to the rising luminary, and he never swerved from the shortest line along the great arc of the circle to the head of Trinity Bay. The Niagara steered by the Gorgon. Her machinery worked with the utmost regularity, never stopping for an instant, and her officers and men were as exact as her machinery. Silence, as far as possible, was enforced, and such light was kept that at



night she appeared to the Gorgon to be illuminated. Who can tell what anxious suspense there was in that ship as each hour, each day, passed on, increasing the chances of success, strengthening the hopeful, restoring the despondent—what sleepless eyes, what beating hearts were there! As the great ships went forward, from the moment when they disappeared from each other below the horizon, messages were constantly interchanged—ship answered to ship as the hours bore them farther apart and nearer their destination. I scarcely know a dialogue more affecting than that which was held between the *Niagara* and *Agamemnon* on this last voyage. At length, on the morning of the 4th of August, under as bright a sky as ever smiled on a great achievement, the headlands of Trinity Bay rose above the sea directly before them.

Then there came out to meet them, and be their pilot into their desired haven, another English ship—the *Porcupine*—whose captain, Otter, had so carefully surveyed and so closely watched, that he had not only found all the channels, but had stationed boats to mark the narrowest, and that the ships might be seen far off, had sent sailors into an island of the bay on which was a high and wooded hill, ordering them to watch day and night, and as soon as the fleet hove in sight to set the wood on fire. The fire was kindled, and the burning hill was at once bonfire and signal for the victorious ships. The bay was so deep that the head of it was not reached till after midnight. There, at five o'clock of the morning of the 5th of August, the end of that mysterious wire was taken ashore; and as soon as it was secured in its appointed station, the brave sailor and humble Christian who commanded the *Niagara*, in the open air, in the early daylight, while all the gentlemen and seamen bowed their heads reverently, gave thanks to the Almighty for the good voyage ended. And thus was the Atlantic cable laid.

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## THE ROMERO BANQUET.

Speech at the banquet given to Mr. Romero, Minister from Mexico, on the evening of the 29th of March, 1864, by citizens of New York, with the view of manifesting their sympathy for that republic in her struggle against French invaders.

At nine o'clock the chairman, Mr. Beekman, called the company to order and said:

"GENTLEMEN: We are met to do honor to the great cause of religious and political freedom, now contended for against fearful odds by our neighbor, the Republic of Mexico. In welcoming her minister and representative, we mean to show our good-will toward his country. Our hearts are so full, we have so much to say, that I venture upon a Mexican pronunciamiento, and interrupt your feast midway by a revolutionary innovation, while I give as the first regular toast 'The President of the United States' [enthusiastic cheers—the company rising]. I call on Mr. David Dudley Field to reply."

MR. FIELD replied:

MR. CHAIRMAN: Why I should be called upon to answer this toast, I do not precisely know. I hold, as you, sir, are aware, no official position, and am in no manner entitled to speak, except as any citizen may, for the President or any member of his cabinet. So far as the toast is a compliment or salutation for the country of which he is the first magistrate, we who are Americans all share, both in giving and receiving it. So far as it calls for the expression of any opinion or intention on the part of the Executive, I, of course, can say nothing.

There is one respect, however, in which all of us—private citizens—may venture to speak for the chief magistrate, and that is when we interpret or express the judgment of the American people. Here, more than anywhere else, the executive department of the government is the agent and exponent of the popular will. The President may, it is true, have information not immediately accessible to the public, and, acting upon it, may decide in a manner of which the public does not at first approve; but, in the end, when the information becomes general, the conclusions at which the nation arrives give law to cabinets and presidents.

When, therefore, we utter the opinion of the American people, we answer, in a great measure, for the President; and in this manner any private citizen, like myself, may venture to speak. So doing, I assert, without hesitation, that, with unexampled unanimity, Americans feel a profound sympathy for the Mexican people in this day of their trial. The sentiment of our country is all but one on this subject. We do not stop to inquire whether Mexicans have not made mistakes in the management of their affairs. That is possible; all nations have done as much. We have done so in the management of our own affairs, of which we are now reaping the bitter fruits. But, whatever may have been the mistakes of the Mexicans, they give no sort of excuse for the invasion of the French, or the attempt of foreigners to impose a yoke upon their country.

This invasion we regard as one of the greatest crimes of our age. To war with a neighboring nation, whose proximity naturally gives rise to irritating questions, is a great evil; but to carry fire and sword among a distant and unoffending people, is a barbarous and cruel wrong which shocks the conscience of the world, and which history will execrate as it execrates the partition of Poland.

Though the minds and hearts of the American people are chiefly occupied with their own long and bloody struggle against an unnatural rebellion, they nevertheless feel deeply the wrongs of Mexico, and they will express this feeling on every proper occasion. We express it here at this festive gathering; they will express it at public meetings, in State legislatures, and in Congress; and they expect the Executive, the organ of the nation, in its intercourse with other nations, to express it also to the fullest extent within the limits of international obligations.

Not only do we give the Mexican people our sincerest sympathy, but we offer them all the encouragement which a neutral nation can offer. We bid them to be of good cheer; to hold fast by their integrity; to stand firm through all vicissitudes, believing in the strength of nationality, in the vitality of freedom, and in that overruling and all-wise Providence which, sooner or later, chastises wrong and casts down the oppressor.

This is not the place to enter upon a discussion of the motives which prompted this French invasion, nor to trace the history of the parties which have divided Mexico, and been made the pretext for the intrusion of foreigners into her domestic affairs. Thus much, however, may be said, that whatever may be the incidental questions that have arisen, there is one great and controlling feature in the controversy: and that is the claim, on the one hand, of the Church to interfere in the affairs of the State, and the claim of the State, on the other hand, to be freed from the interference of the Church. We hear constantly of the Church party in Mexico. Why should there be a Church party? What can it have legitimately to do with secular affairs? With us it has been a fundamental maxim, from the formation of our government, imbedded in the organic law, that there must be forever a total separation of Church and State. The Mexican people—that is to say, the true and loyal portion of them—are struggling for the same end; and in this we Americans, of all creeds and all parties, bid them God-speed. Yes, all of us, excepting only the rebel who raises his arms against his country, and the deceitful renegade who, not daring to raise an arm against it, seeks yet to betray it; all of us, I say, with these exceptions, pray for and believe in the deliverance of Mexico. It may be sooner or later; it may come through greater misfortunes than any which she has yet suffered, but come it will. The spirit of freedom is stronger than the lances of France.

Maximilian may come with the Austrian eagle and the French tricolor; he may come with a hundred ships; he may march on the high road from Vera Cruz to the capital, under the escort of French squadrons; he may be proclaimed by French trumpets in all the squares of the chief cities; but he will return, at some earlier or later day, a fugitive from the New World back to the Old, from which he came; his followers will be scattered and chased from the land; the titles and dignities which he is about to lavish on parasites and apostates will be marks of derision; the flag of the republic will wave from all the peaks of the Cordilleras, and be answered from every mountain-top, east and west, to either ocean; and the

renewed country, purified by blood and fire, will resume her institutions and be free.

Such, Mr. Chairman, are, I am sure, the wishes and the expectations of the American people; and this, I am bound to presume, would be the answer, if he were free to speak, of the President of the United States.

## CONGRATULATIONS OVER VICTORIES.

SPEECH AT UNION SQUARE, NEW YORK, MARCH 6, 1865.—After the retaking of Charleston, in the winter of 1865, a mass-meeting for congratulation was held in Union Square, at which Mr. Field made the address which follows.

On the 27th of March the Secretary of War issued the following order, by direction of the President of the United States :

“ WAR DEPARTMENT, WASHINGTON, March 27.

“ GENERAL ORDERS No. 50.

“ *Ordered: First.* That at the hour of noon on the 14th day of April, 1865, Brevet Major-General Anderson will raise and plant upon the ruins of Fort Sumter, in Charleston Harbor, the same United States flag that floated over the battlements of that fort during the rebel assault, and which was lowered and saluted by him and the small force of his command when the works were evacuated, on the 14th day of April, 1861.

“ *Second.* That the flag, when raised, be saluted by one hundred guns from Fort Sumter, and by a national salute from every fort and naval battery that fired upon Fort Sumter.

“ *Third.* That suitable ceremonies be had upon the occasion, under the direction of Major-General W. T. Sherman, whose military operations compelled the rebels to evacuate Charleston, or, in his absence, under the charge of Major-General Q. A. Gillmore, commanding the department. Among the ceremonies will be the delivery of a public address by the Rev. Henry Ward Beecher.

“ *Fourth.* That the naval forces at Charleston, and their commander on that station, be invited to participate in the ceremonies of the occasion.”

ALTHOUGH we can not yet say that the rebellion is entirely subdued ; although a large and formidable rebel army still confronts us in the defenses of Richmond, and another on the plains of the Carolinas, we have nevertheless arrived at that stage of the war when we may indulge in mutual congratulations upon the successes we have achieved, receive the lesson which the history teaches, and pledge ourselves anew for the work which remains before us.

The reasons for congratulation are abundant : Four years ago the nation seemed to the world to be dying ; seven States were in open revolt, others stood ready to follow, and all were agitated by dissensions. The people were filled with distrust and apprehension. Nothing had been done to vindicate the

national authority, and the country appeared to be drifting into hopeless anarchy. Men exclaimed to each other with dismay, "Is this great nation to fall without a blow struck in its defense?" Then ensued weeks of indecision and painful suspense, till the flash of a hostile gun in the harbor of Charleston awoke the nation as from a long and troubled dream.

In what rapid succession events followed; how armies were mustered on both sides and dashed against each other; how, for a time, the tide of battle ebbed and flowed; how, nevertheless, the loyal army regained, one by one, the fortresses, the cities, the States, that had been engulfed in the rebellion; how the national standard, the symbol of union and of glory, was gradually advanced, sometimes hidden in the clouds of war, then emerging into the unclouded light, till it was replanted in every State from which it had been excluded; how the whole maritime frontier this side of the Mississippi has been restored, till not a single rebel flag is flaunted from the land to the sea—all these things are written in the history of the four intervening years.

Well may we rejoice over these achievements, though we regret the waste of war and mourn for the precious lives sacrificed to their country.

We rejoice to-day, not in the spirit of party, not because this or that leader has been chosen, but because the nation stands erect again, having retaken the fortresses of which it was treacherously despoiled, from the last to the first.

I hope, nevertheless, to see another and more memorable solemnity on the anniversary of the fall of Sumter. You remember the simple, touching dispatch which the gallant general who stands by my side sent to the Secretary of War announcing the surrender, closing with these words: "I marched out of the fort Sunday afternoon, the 14th instant, with colors flying and drums beating, bringing away company and private property, and saluting our flag with fifty guns." [Loud applause, and calls for General Anderson, who came forward and was greeted with vociferous cheers, the band playing "Hail to the Chief," after which Mr. Field proceeded.]

This surrender was on the 14th of April, 1861. Let him be sent back on the 14th of April, 1865, with as many of his

gallant comrades as survive to share his glory; let him go in one of those mailed ships of war which the rebellion has brought forth; let him replace the same flag on the same spot with all the pomp of war and all the solemnity of an act of religion; and as the southern wind kisses that standard, never more to be removed, let a hundred guns salute it from fort and ship, and island and city, as with the voices of a great people, proclaiming their majesty on the site of the first treason against it.

In our rejoicing, let us lay to heart the great lesson which this history teaches, that avenging justice sooner or later overtakes the crimes of communities and of nations, as of individuals.

This rebellion was a crime; it had no plausible excuse, no decent pretext. The Government against which it rose was a government of the people, mild and beneficent. If it erred, its errors were easy to discover and not impossible or even difficult to remedy. If it was not always wise, it was not more unwise than the best of other governments. In its gentle sway it had displayed so little of force, that it seemed fallen into weakness; and they who rebelled against it, thought it had not strength enough to repel aggression. They were mistaken: the power which seemed to be dead was alive; it only slept, and when it awoke it smote the rebels with the strength of a giant. From the Potomac to the Rio Grande, on the bayous of Louisiana, across the plains of Alabama, the mountains of Georgia, in the defiles of Tennessee, and along the magnificent rivers of Virginia, the conflict has raged with incessant fury, till the rebel armies are driven back into the two States which were the last to enter into the revolt.

The crime of the rebellion was the offspring of another and a greater crime which had flourished for many years and grown strong and arrogant in its strength—the crime of human slavery. What mortal eye foresaw the doom that was impending over it? Who, but the Omniscient, could have seen that the strength of slavery was its weakness; its pride the source of its dishonor; its arrogance the cause of its overthrow? The stain which had fallen upon the American name has been washed with blood and burned with fire, till nothing



remains, except in history, for a memento of man's wrong and God's justice.

While thus reflecting upon what we have passed through, let us pledge ourselves to our country, to each other, and to posterity, that we will not rest nor falter till the wrong is entirely righted, till the rebellion is utterly overthrown, and till there shall be one flag, one heart, and one hope, for all who dwell between the eastern and the western oceans.

The work which remains before us is hardly less difficult than that which we have already performed. We have not only the war to finish, but we have the still greater task of pacification. This great nation of thirty-six States is to be made united, peaceful, and prosperous, with the rights of the States and the rights of individuals as clearly defined and as firmly secured as the rights of the nation. Here is a field for the statesman's art—his most consummate art. Justice, not vengeance should be his motto; he should look more to the future than to the past. Some things may have been done—I think some things have been done—in this war, even on our side, which must be remembered only to be avoided. But this is not the time to dwell upon them. Let us devote ourselves to the work now in hand. Let us struggle with all our might, first to scatter the last armed rebel battalion, and then to bring in the reign of peace, order, and law. Let us build up defenses that no man can break, and let us transmit to our descendants the nation and the States, with all their rights, all their guarantees, as we would have them remain through innumerable ages.

## A MEMORIAL ADDRESS.

Address of Mr. Field, on the occasion of unveiling the monument to the graduates and undergraduates of Williams College who fell in the civil war. Delivered at Williamstown, Mass., July 28, 1868.

MR. PRESIDENT, LADIES AND GENTLEMEN: The statue which we this day uncover to the sun is a tribute and a memorial. It is the tribute of this generation to patriotism, fidelity, and heroic virtue. It is the memorial to future generations of a great war and a great peace.

Patriotism has its roots deep in the instincts and the affections. Love of country is the expansion of filial love. If you ask me why I bear affection to my native land, I answer that I bear it to her for the same reason that I bear it to my mother. As it is in my nature to love the one, so it is in my nature to love the other. My country is in name and in fact my fatherland.

Self-love, pride, gratitude, memory, and hope contribute to the patriotic sentiment. I am a part of my country, and, loving myself, I love her; I am proud of her achievements, and I take to myself a portion of her honor. I am grateful for her protection. As her flag over me is a mark of my distinction, so it is a pledge of my defense. The nation is the largest political society to which I can belong. It is my legislator and governor. The hill upon which I first opened my eyes, the brook in which I played, the hearth by which I sat in the long winter evenings, the roof beneath which I listened to the pattering rain, the trees before the door, the birds which sang between the eaves, the river in the distance; as these came first into my mind, there they remain after many a greater thing has been seen and forgotten. My memory is filled with pictures of the land and people of my childhood. My personal fortunes are blended with the fortunes of my country. I hope to prosper in her prosperity, and, if she falls, I expect to fall with her.

An indescribable charm follows nativity. Wander where you will, your heart turns instinctively to the place where you were born. Expatriation is an extreme measure, and the last resource. Of all the innumerable company who, in the hope of better fortunes for themselves and for their children, leave the Old World for the New, how few are they who do not continue still to dream of the fatherland and its people, to tell its tales, and to sing its songs at their new firesides! I have seen the emigrant returning from his home in the West, to revisit his native land, watching with the stars through all the night to catch the first glimpse of her shores; and I have seen him, as the morning light revealed the dim outline of the distant coast, rush to the ship's bow to salute it with a loud huzza, and an "All hail, my country!"

It is not strange that patriotism, always a sentiment of preponderating power, should, when excited by national peril, sweep everything before it. He who witnessed the excitement of the country upon the fall of Sumter must remember the fire with which every heart was kindled. Who that recalls that April day, when the news came of the parricidal and insane assault, does not also recall the horror and indignation which it created; and when at last it was known that the stronghold had fallen, and the flag of so many memories and hopes had been lowered, that then the minds of men were awayed and lifted as by a divine impulse? Differences of opinion and of party were lost in the great swell of human hearts. Then uprose the whole people, not in passion or in fear, but with a common will and purpose to avenge the insult, and defend their national unity to the last extremity. Then were flags flung out from window and tower; the streets waved with summoning banners, and the air seemed filled with voices calling the sons of the republic to battle.

The lowering of the flag at Sumter smote the hearts of the people. For what is the flag? It is more than a streamer of bright colors dancing in the wind; it is more than a picture, however beautiful it may look as it lies across the green of the landscape, flashing its light among the trees. It is a sign. A sign of what? Of this broad land and its people, and their institutions—as they have been, as they are now, and as they

will be hereafter. It is an opened scroll, on whose ample folds is written, in characters visible to the inward eye, all the past history, and in characters not now visible, but coming into light day by day, all the future history of this people. It went with Washington and his brave continentals through the dark days of the Revolution; it went with the pioneers in their march toward the ever-receding sun; it floated at the mast-heads of triumphant ships; it emerged bright and beautiful as ever from the smoke and fire of battle; and it now floats over ship, and tower, and fortress, wherever the American has carried his spirit and his power. No true child of this land has ever looked on it at home without a feeling of reverence, or looked on it abroad without wafting a blessing toward his country.

No wonder that, when it fell for a moment at Sumter, the spirit of the people waxed fierce; and no wonder that, when the hour of deliverance and of retribution came, the same flag was raised again by the same heroic hand which was forced to lower it; and that it was saluted, not as then, with fifty, but now with a hundred guns, amid all the pomp of civic and martial glory.

Such was the sentiment and such the impulse that affected our brethren whose names are inscribed upon this monument. They loved their fatherland, and loving, they died for what they loved.

They were faithful to their convictions. By their acts they set forth, better than any words can express, the great virtue of fidelity, devotion to duty, and steadfast adherence to that for which they plighted their faith.

A man is pledged by his convictions and relations not less than by his words and acts. Our moral nature prompts us to follow our convictions. Our relations to others impose upon us duties which we can not neglect without self-condemnation. As a citizen, a man has obligations independent of his will. He is a member of the State, and is pledged to obedience and assistance. He has personal relations to father, mother, brethren, and is bound to their defense, and thence to the defense of the country which shelters them. This fidelity to his pledges, this loyalty to his family, friends, country, distin-

guishes the true man. Faith once plighted by him does not falter. Difficulties embarrass but do not dishearten him. False friends fall away, he remains firm; disasters occur, he strives to repair them; defeat comes, he stands up as resolutely as before. Steadfast in that to which he is pledged, he presents the same heart and the same will to adverse as to favoring fortune.

They to whom we raise this monument were thus faithful. Their country was threatened with disruption and anarchy; they were bound to it, and they defended it. Everlasting honor be given to the brave men who sealed this their fidelity by heroic death!

Heroism, in which I include courage, fortitude, and self-denial, is an essential element of a great character: courage, which leads a man forth to meet danger whenever thereto called by duty; fortitude, the power and practice of endurance, which renders him superior to pain, and makes him accept with cheerfulness whatever fate comes; and self-denial, the subordination of the material to the spiritual, of the lower to the higher nature of man, which renders his will master of his appetites and passions, and causes him to forego every personal benefit for the sake of honor and conscience. That nobleness of soul which declines no danger, shrinks from no pain, and counts life itself as nothing compared with the fulfillment of duty, distinguished the greatest men of antiquity. In a still higher form it was displayed by the Christian martyr. He exhibited above all men that superiority to pain which is better than stoicism, that courage which advances to meet danger, that fortitude which accepts it when it comes, and that self-denial which thinks nothing worthy to be weighed against the right. It was not passive insensibility to danger, but an active moral sentiment, which sustained him, and impelled while it sustained. Nor was it physical strength, for the weakest man and the feeblest woman have accepted the crown of the martyr.

These, our brethren, had much of the heroic Greek and Roman; they had more of the Christian martyr. Not only was the integrity of their country involved, but the moral and political life of four millions of human beings. For, though

the war was not waged by the North for the emancipation of the slaves, but for the suppression of the rebellion, yet this rebellion, begun in the interest of slavery and for its perpetuation and extension, soon made it evident that the victory of the Government would be the advent of freedom, immediate and universal. Four millions would then be raised to the dignity of men, endowed with civil rights, gladdened by the light of knowledge, and admitted to participation in all the benefits of Christian civilization. Thus, to the other motives which affected the patriotic citizen, were added the sanctions of religion.

This monument is the affectionate though insufficient tribute that we pay to the patriotism, fidelity, and heroism of our brethren whose names are inscribed on this pedestal. There were thirty of them, of different ages, from the fair-haired youth not yet graduated, to the gray-headed man who looked back through many years to his leave-taking here. I wish I could give the story of each one's life, and could tell you how he looked and lived in college, how the world received him as he passed into it from the doors of these halls, what he was doing when the great war broke out, and how he went into the struggle, and struggling, died. The simple story would be more affecting than anything I could say. But time would fail me to speak of all, and, if I were to distinguish any, I might do injustice to the rest. The biographer will do justice to all.

Their work is accomplished. They have no more responsibilities to bear, no more duties to perform. Whatever responsibilities and duties remain devolve upon us. As the motives I have described led our brethren to the sacrifice of their lives, so the same motives should lead us to whatever sacrifice we in our turn may be called to make. To take up arms for your country's deliverance is one form of manifesting your devotion to it, but it is not the only one. Peace, like war, has its sacrifices. There are other dangers besides those of disruption and anarchy, and other honors besides that of victory over insurgents. Whatever would discredit our country, or weaken it in material or moral power, must be resisted, as we would resist an attack upon its territorial integrity. The per-

sistent denial of its just obligations, for example, would work an injury second only to that of disruption. The debts of nations are especially debts of honor, since none of them can be legally enforced. What would be dishonorable in an individual, would be doubly dishonorable in a nation. It is the plainest duty of the country to pay every borrowed dollar, not only according to the letter of the bond, but according to the understanding of the lender as understood by the borrower. No other rule is consistent with honor, with justice, or with policy.

There is another kind of repudiation, even more dishonest, and equally fatal—the repudiation of official trusts. To repudiate a debt is base; to repudiate a trust is baser, since the latter involves the double dishonor of falsehood and betrayal. The legislator, the judge, the magistrate, who, receiving a public trust for public ends, perverts it to private ends, is as base a wretch as he who robs his employer, or runs away with the pocket-book of his friend, or embezzles the money of a bank of which he is guardian. A corrupt Legislature dishonors a state not less than the defeat of its armies. The humiliation of the flag may be effected not more by force without than by fraud within. Our friends, whose names we hold in such honor, fought against force; it is for us to fight against fraud. And every man in official station who acts from any other motive than the conscientious discharge of his trust, is a fraudulent rogue, and every citizen who upholds any such man or his measures is an accomplice in the fraud.

If we have not rebels in arms to fight, we have political and social disorders more subtle and not less dangerous to overcome. An abased press must be lifted into the region of truth and honor; and the elective franchise must be honored as a trust, and exercised as a matter of conscience.

Let us turn now from the view of this monument as a tribute, to the view of it as a memorial of a great war and a great peace, and of the gallant part therein which these men bore.

A great war it was. Scarce ever was there a greater. In its onward course it swept millions of men into the field, sacrificed hundreds of thousands of lives, and wasted more than

five thousand millions of treasure. The whole population took sides—not the men only, but the women; each person in his sphere—the old man giving his counsel, the young man his strong hand, the matron and the maiden encouragement and contribution in every form in which woman can minister.

This war drew after it a great peace. It brought “the deliverance of the captives, and the opening of the prison” to them that were bound. When it ended, four millions of persons stood up in the glory of freemen, who were slaves when it began. The questions of secession and slavery, those apples of discord, which had troubled the nation from its origin, were settled for ever. The land was delivered from the superstition of the weakest of heresies, and from submission to the worst of institutions. When we met here eight years ago, fifteen States of this Union recognized human servitude as an established institution; the laws were fashioned in the interest of the master, to maintain his dominion and the submission of his slaves; public opinion went even beyond the law in its exaction; freedom of the press and of speech was an empty phrase; personal immunity was talked about but not practiced; and social ostracism completed the tyranny which the law and lawless violence began.

To-day there is not a slave in the land. All who were born in God’s image may now stand up in the full light of God’s liberty. The Union of the States is indissoluble; the country is undivided and indivisible for ever.

For us it remains to complete what these heroic brethren began. Let us finish the building with the symmetry and beauty of its first design; many States compacted into one nation, but retaining, nevertheless, their character as separate and indestructible parts and supports of the great whole. It is a curiously contrived and wonderful structure; a masterpiece of political architecture. “*Manet et manebit.*”

Though in the process of pacification some methods were adopted which I could not approve, I will not speak of them here. An indissoluble nation, and the freedom of all its people, have been secured by the peace, and therefore I call it a great peace. Let us do what further may be needed to make



it a reconciliation. Let us remove as far as possible every cause of continuing irritation. The dead we can not bring to life; the mutilated we can not make whole; but we can rebuild the burned dwelling; we can recultivate the wasted field; we can sit down with our late adversaries and make the agreement between us real; we can labor together to repair the desolation of war, and to reconstitute society wherever it may have fallen into disorder. Let us do this with a true and not a seeming consent, and, so doing, we shall both honor the memory and profit by the labors of the brave men, who died for the freedom, purity, and union of the whole land.

Such a war, and such a peace, deserve a memorial that shall last as long as yonder mountains look upon this valley. Let us hope that in the spot where we have placed it, it will stand through summer and winter, with the same placid face to the fierce storm and the sweet sunshine, witnessing to the generations as they pass the trials and the glories of our days. Here let it remain, in the shadow of the mountains, standing like a sentinel at the dawn of morning, at noon, at eventide, in the soft moonlight and beneath the stars.

And in all future time, as students gather here in successive classes, may each say to himself as he passes before it: "This is the monument of my countrymen, who fell in the great civil war which sealed the unity of my country, and delivered it from slavery, and here I promise to maintain its purity, freedom, and unity; no dishonor shall befall it by word or deed of mine; and whoever counsels its people to a dishonest or dishonorable act shall be my enemy for ever!"

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## EMOTIONAL INSANITY.

Paper read by Mr. Field before the Medico-Legal Society of New York, April 24, 1873.

Is there such a thing as emotional insanity, and, if there be, does it excuse an act otherwise criminal? These questions depend upon another, more general, that is to say, What is insanity in its relation to crime? Satisfactory answers would be, as we all know, of inestimable service in the administration of criminal law; and the aim of this paper is to contribute, whatever I may be able, toward their careful consideration. My point of view is, of course, the legal side of that twofold science which we call medico-legal, or, as I should prefer to express it, "medical jurisprudence." The pathology of insanity is beyond my province.

A crime is an act or omission forbidden by law, to which is annexed, upon conviction, a certain punishment. Our present inquiry relates solely to human law and human punishment. The element of religion or morals does not enter into the question. No reference is made to a violation of the moral or divine law, however great may be the guilt or awful the punishment. For the present hour, we are concerned only with a violation of those laws which depend upon human sanction; and when I speak of the relation of insanity to crime, I mean the relation which it bears to a violation of the law of the land. Punishment is something annexed to crime, as a consequence, painful to the offender; or, in other words, a penalty which he is to suffer for his violation of the law. What is the theory upon which punishment is inflicted? It is not to avenge. "Vengeance is mine, saith the Lord." "To me belongeth vengeance and recompense." The purpose of human punishment is neither revenge nor retribution, but the enforcement of the laws. This is effected by annexing a penalty to their violation. The penalty operates not by way of

satisfaction, but prevention. The object is to deter. The threat of punishment is addressed to all. An instance of punishment has a twofold operation: first, upon the offender, to deter him from a repetition of the offense; and then upon others like him, to deter them by force of his example. The measure of a just punishment is, therefore, that kind and degree, which are necessary to such an end.

The rightfulness of punishment depends solely upon its necessity. The test is not the greater or less ill deserving of the offender, but the safety of society. Laws are made for the protection of rights. If it be necessary to have laws, it is necessary to enforce them. *Necessitas quod cogit defendit.* Show me that a certain rule is necessary to the public good, and that a certain punishment is necessary to the enforcement of the rule, and I accept the conclusion as irresistible that this punishment may be rightfully inflicted. The authority to take human life can only be justified by such a course of reasoning. The argument embraces not only penal laws, but all human conduct. If four men are at sea in an open boat, three of them struggling to reach the land, and the fourth, maddened by distress, insists upon upsetting the boat, the three may rightfully throw him into the sea. When Sir John Franklin, on his perilous journey in the frozen zone, shot one of his men who showed signs of mutiny, dangerous to the rest, he exercised an inherent right to protect the company which he was trying to lead to a place of safety. Every age of the world has seen monsters, *hostes humani generis*, whom it was justifiable to exterminate. So in all regular government, the safety of society is the warrant which the Almighty has given for the punishment of those who infringe its laws. This necessity is not only the warrant, but the limit of the power. For useless punishment is itself crime.

Starting from this point we enter upon the question of insanity in its relation to criminal responsibility. I say in this relation, because here lies the first distinction which it is necessary to bear in mind. There may be a degree of the disease which requires that the patient should be shut in a lunatic asylum, or which would invalidate his contract or his testament, but which, nevertheless, would not absolve him from the charge

of a criminal offense or its consequences. Our statutes may declare, as they do, that "no act done by a person in a state of insanity can be punished as an offense, and no insane person can be tried, sentenced to any punishment, or punished for any crime or offense while he continues in that state." But this is general language which needs qualification, in its application to the facts of particular cases.

It is curious to observe with what different views different persons regard the question of insanity. The lawyers do not agree with the physicians, or among themselves. The physicians do not agree with one another. Scarcely any two writers, or, for that matter, any two judges, agree upon the same definition or test. This strange disagreement it may be worth our while to illustrate by a few examples :

In 1843 the Judges of England answered certain questions propounded to them by the House of Lords, in reference to *McNaughton's case*, to one of which the answer was as follows : "The jury ought to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction, and that, to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defective reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." The test thus given is rejected by Bucknill, who, in his essay on "Unsoundness of Mind in Relation to Criminal Acts," says : "We must therefore conclude that this, the main portion of the Judge's condition of exemption from responsibility and punishment, on the plea of insanity, is erroneous in principle and inapplicable in practice." And Dr. Hammond says : "Neither is the knowledge of right and wrong a test of the mental condition of an individual, except to a very limited extent. The faculty in question is not inherent, but is the result of education."

In this country, nearly twenty years ago, on the trial of Huntington for forgery, an attempt was made to establish the defense of moral insanity, which is but another name for one

species of emotional insanity. On this occasion, the City Judge of New York, Judge Capron, charged the jury in these words :

"But it is insisted for the prisoner that insanity, either general or partial, may exist, and the subject be totally unable to control his actions, while his intellect or knowing and reasoning powers suffer no notable lesion. By this theory, insanity is regarded as a physical disease, an affection of the brain, by which the freedom of the will is impaired or destroyed, and the subject is thus wholly deprived of the ability to govern his acts. It is claimed that persons thus afflicted may be capable of reasoning or supporting an argument on any subject within their sphere of knowledge. In a more practical sense, it is claimed that a person may steal your property, burn your dwelling, or murder you, and know that the deed is a criminal offense, and that he will be punished if tried and convicted, and may be able to reason on the subject, and yet be guiltless on the ground of insanity! This affliction has received the name of MORAL INSANITY, to distinguish it from intellectual insanity; because the natural feelings, affections, inclinations, temper, or moral dispositions, only are perverted, while the mind, the seat of volition and motive, remains unimpaired. I will not assert positively that this theory is unsound. It may be reconcilable with moral responsibility for human conduct, but I am not reluctant to confess *my own mental inability to appreciate* harmony between the two propositions, if it exist. This theory may afford a more just and humane standard by which to test the presence of insanity in a particular class of cases than the existing rule; but, until the proper authorities sanction that theory, it can not be regarded here."

On the trial of Sickles for murder, a year or two later, the Judge of the Criminal Court at Washington gave these instructions to the jury :

"If, from the whole evidence, the jury believe that Sickles committed the act, but at the time of doing so was under the influence of a diseased mind, and was really unconscious that he was committing a crime, he is not in law guilty of murder. If the jury believe that, from any predisposing cause, Sickles's mind was impaired, and, at the time of killing Key, he became

or was mentally incapable of governing himself, in reference to Key, as the debaucher of his wife, and at the time of committing said act was, by reason of said cause, unconscious that he was committing a crime as to said Key, he is not guilty of any offense whatever."

In Willis's case, decided by our Court of Appeals in 1865, Chief-Justice Denio observed: "The Judge might have said that, if the prisoner, when he killed the deceased, was in such a state of mind as to know that the deed was unlawful and morally wrong, he was responsible, and that otherwise he was not. This would, perhaps, have been more precise and discriminating. . . . The general correctness of the principle laid down can not be questioned. It is in substance, and in the language usually adopted, and which is sanctioned by the authorities."

In Wagner's case, tried in New York the same year, this language was addressed by the Court to the jury: "I have been requested to charge you that if the prisoner committed the act in a moment of frenzy he can not be convicted of murder in the first degree. I not only charge that proposition, but, if his mind was in that condition, he can not be convicted of any offense. The true test of responsibility for acts committed is commonly known as the test of right and wrong. If the jury are satisfied that the prisoner knew the difference between right and wrong, in regard to the particular act in question, then the law holds him responsible for the act. If they are not so satisfied, of course it would be their duty to acquit him absolutely."

In Cole's case, tried in Albany in 1868, Mr. Justice Hogeboom told the jury that, "if reason was in fact dethroned, if Cole was not at the time in the possession of his faculties, if they were suspended and lost in the presence of, and under the influence of, an overwhelming domestic calamity, if Cole was at the time incapable of distinguishing between right and wrong in regard to this transaction, or of appreciating the moral quality of his act, he could not be held criminally responsible."

In MacFarland's case, tried in 1870, Recorder Hackett, of New York, charged the jury that "sanity is the state in

which a man knows the act he is committing to be unlawful and morally wrong, and has reason sufficient to apply such knowledge, and to be controlled by it."

On the trial of Montgomery, at Rochester, in 1871, Mr. Justice Darwin Smith charged the jury that "there is now no room for doubt as to the rule of law in this State. 'A man must have sufficient knowledge, reason, capacity, judgment, and mental power to understand, not merely that his act is a violation of law, but that it is intrinsically wrong.' Every human being endowed with reason knows that to take the life of a human being is against the law of nature and of God. It is not sufficient that he knows the thing is an offense against human laws, but he must have reason and capacity sufficient to know that he is not only violating the laws of man, but the laws of God and nature."

On Scannell's trial a month ago, Mr. Justice Brady charged the jury as follows:

"That insanity, considered in its legal aspect, may be stated thus: It means such a defect of reason as would render the prisoner unconscious of the nature and character and consequences of his act, and of its unlawfulness and immorality. A man is, by the law of this State, responsible for his acts when he knows what he is doing, is capable of distinguishing right from wrong, understands the consequences of his act, and that it is in violation of the laws of God and man. In other words, if the prisoner was in such a state of mind as to know that the deed was unlawful and morally wrong, he is responsible; otherwise not. If he was incapable of distinguishing between right and wrong, did not know that the act he was committing was unlawful and morally wrong, you can not convict him of murder."

Balfour Browne, in his late work on the medical jurisprudence of insanity, gives the following as his conclusions: "We are now in a position to consider the capacity to commit crime. The statement of the proposition, that the criminal law looks mainly to the intention which actuated the accused, has been said to imply the presumption that the individual whom it is sought to bring within the operation of the law, has mental capacity, is a free agent, and possesses the power of electing to

abstain from what is forbidden, rather than suffer the consequences of offending; and the criminal law of England, therefore, declines to punish where the actor, from want of understanding or mental disease, is not in a position to choose freely; and it might properly be added where, through such enfeeblement or derangement, motives have lost their power of making a man choose the good rather than the bad, and the pleasant rather than the disagreeable.

"It is the same principle that induces the law to exempt very young children from the criminal responsibility of their acts; and the same principle is to be found as the reason for the non-infliction of legal penalties where the individual is, against his will, compelled to do a wrongful act, inasmuch as the dread of distantly future penalties can not, in reason, be expected to prevail against the fear of present suffering.

"Were it more generally understood—were it more thoroughly appreciated—that it is really the same fundamental principle which induces the law to forego its penalties, even after proof of the criminal act done, in these two classes of cases, less difficulty would undoubtedly arise in practice as to what amount and what kind of insanity is sufficient to establish a claim to immunity from punishment. Were it once held that the proof of that amount of insanity would relieve from the consequences of a criminal act which deprives the individual, either by amentia, dementia, or mania, of that amount of free-will, or choice of that power to balance and appreciate motives which is found in the ordinary ranks of mankind—were it held that the amount of insanity which deprives a man of this, as the amount of duress which deprives a sane man of the same power, would relieve an individual of criminal responsibility, no doubt could, it seems, in any case arise." . . .

And again: "A German jurist (Mittermaier), appreciating the weight of the medical testimony in criminal cases, has maintained that two conditions are required to constitute that freedom of will which is essential to responsibility, viz., a knowledge of good and evil, and the facility of choosing between them.

"This definition is, perhaps, more nearly correct than most that have been given, but it seems to us, looked at in reference



to the most recent philosophical researches, and also in relation to the duty of the law to protect the sane from injury, as well as to protect the insane from unnecessary, useless punishment, that the best definition that can be given of legal responsibility is a knowledge that certain acts are permitted by law, and that certain acts are contrary to law, and combined with this knowledge the power to appreciate and be moved by the ordinary motives which influence the actions of mankind."

The various definitions of insanity or of that degree of it which exempts from criminal responsibility, contained in the extracts that I have here given, not only differ among themselves, but fail, as I think, to furnish a true and plain rule for judicial investigation, such a rule as would be scientifically exact, and, at the same time, easily understood by juries.

It may be rash for me to try where so many have failed; but, unless there be trial, there can not be accomplishment, and it is the privilege of all to endeavor, though only one may succeed. Let me, then, offer my contribution to the work of this society, by helping, even though it may be in a small degree, to answer a most important and interesting question.

It appears to me that the true answer is to be evolved out of the theory which I have given of crime and punishment. The ideas of crime and punishment are correlative. That only is crime to which punishment is annexed as a consequence, and everything to which punishment is annexed is criminal. Crime being, as we have seen, an act or omission forbidden by law, to which punishment is annexed, and, the object of punishment being to deter, it should seem to follow that punishment is to be inflicted only when it will be likely to deter. But the rules of law are general, and must provide for punishment upon general considerations. It should annex a penalty to an injurious act whenever, according to the general experience and judgment of mankind, the penalty will deter the actor from the repetition of the act, and others like him from imitating it. If it will probably have that effect, society may inflict the punishment; if not, not. The question, then, of insanity, in relation to criminal responsibility, is not merely whether the offender is of unsound mind, but whether his unsoundness is of that kind and degree that he would not, according to the general

experience and judgment of man, be deterred by punishment from a repetition of the act, if committed by himself, or of committing it, if seen by him to be followed by punishment when committed by others. And all this depends upon the question whether the offender was or was not a free agent; that is to say, whether he acted from compulsion so strong that the fear of punishment could not withstand or overcome it. There must have been freedom of choice between doing and not doing, and capacity to choose. Since the object of punishment is, as I have said, to deter an offender and others like him, and since one can be deterred so far, and so far only, as his act is voluntary, the question of legal responsibility must come to this—Was the person accused capable of knowing that the act or omission was a violation of law, and of refraining from it? Was he *capable of knowing and refraining*? I do not ask whether he *did know*, but whether he was *capable of knowing*. If he was *capable of knowing* and of *refraining*, then he was, in the sense of the law, a free agent. The points to be submitted to a jury are, first, was he *capable of knowing* that what he was about to do was a violation of law; and being thus capable *could* he have refrained from doing it, or, to use a common phrase, “could he help it?” and I venture to say that upon these two ultimate questions hangs the decision of the issue of insanity in criminal cases.

The questions assume, of course, that the offender is of the age of discretion, and being thus advanced in years is not below it in mind. Children under seven years of age and idiots are not within the scope of criminal law, though they can be operated upon by motives and restrained by punishment. Two boys, five and six years old, playing together, we will suppose, have been taught that one must not strike the other, or, if he does, that he will be punished for it, and, ordinarily, this knowledge will control him; but if one should happen to strike a blow, causing death, no one would think of hanging or imprisoning him for it. Why? Because the fear of such a punishment would have no greater effect in deterring the child than the slight discipline of the nursery. It is not that he does not know the act to be wrong, or that the fear of punishment would not, in most instances, deter him from striking his com-

panion, but because his reason is too feeble, and his will is so little under subjection to his reason that a sudden impulse overcomes him. You may even suppose that he intended to kill, not from malevolence, but from curiosity or an imagination excited by stories of killing, but he has no idea of death as a consequence of the blow; and if he had, as a small object present is stronger with him than a great one future, so an impulse of the moment upon his feeble mind overcomes any idea of consequences at a distance. The same reasoning which would exclude a child from the scope of criminal law would exclude also an idiot or an imbecile. There must be a capacity to reason, and a power of reason over the will sufficient to deter.

Excluding, then, children under the age of discretion, idiots, and imbeciles, as not within the range of our immediate inquiry, I recur to the question of insanity in reference to other persons, and, taking the rule of criminal responsibility, as I have stated it, let us apply it to the different stages of mental disease. In doing so we should bear in mind that whatever be the true rule, it is, in the present state of the law, applicable to every kind of crime and punishment, whether the crime be in act or omission, or the punishment be death, imprisonment, or fine.

And here let me observe that I think much of the difficulty, in regard to the defense of insanity, has arisen from the desire to escape the extreme punishment of death. The mind shrinks from taking the life of one who may, by possibility, be guiltless of intentional wrong, and catches at any plausible excuse for treating the case as one of insanity. We should, however, not be influenced by such considerations, and must treat the question as independent of particular punishments. If insanity is a defense when the charge is murder, it is also a defense when the charge is harboring a fugitive slave, or smuggling goods over the frontier.

Insanity, in its general pathological sense, is thus defined by Dr. Hammond, than whom there is no higher authority: "As no two brains are precisely alike, so no two persons are precisely alike in their mental processes. So long, however, as the deviations are not directly at variance with the average hu-

man mind, the individual is sane ; if they are at variance, he is insane." The medical profession thus pronounces that person insane whose mental processes are directly at variance with the average human mind. Now, whatever may be the real essence of the mind, we know it only by its phenomena, and these manifest themselves in four different forms, namely: In the perceptive faculties, the reasoning faculties, the emotional faculties, and the executive faculties ; or, in other words, the perceptions, the reason, the emotions, and the will. Under the head of emotions, I place the passions, the appetites, and the affections. Thus, say the medical faculty, that person is insane whose mental processes are directly at variance with the average human mind, in respect either to his perceptions, his reason, his emotions, or his will ; that is to say, there may be perceptive insanity, intellectual insanity, emotional insanity, and volitional insanity. I have not time to give instances as illustrations of the different kinds of insanity. It is enough to say that in perceptive insanity those parts of the brain only are disordered which are concerned in the formation of perceptions, and it consists entirely in the formation of false perceptions, which are designated as illusions or hallucinations, as they proceed from without or from within. In intellectual insanity, the essential feature is delusion or false belief, in respect to material objects. In emotional insanity, the emotions paralyze or dominate over the intellect or the will ; and, in volitional insanity, the will has passed beyond the control of the intellect.

This is the medical side of insanity. Now let us look at the legal side. Here the question is, not whether there is insanity in a medical sense, but whether there is that kind and degree of it which, as a general thing, would make punishment useless, considered as a motive to deter. Have we not the key to the answer in what has been already said ? The will is the executive department of the mind. Whenever a crime is committed, or the temptation to commit it is resisted, the commission and the resistance are acts of the will ; and whenever the will acts in resistance of temptation, it acts in obedience to the reason. The temptation generally comes from the perceptions or the emotions ; the resistance from the reason and the will.

It is the will which executes and the reason which guides. Choice is an act of reason. Execution is an act of the will. Whenever, in respect to a particular transaction, the subject of a criminal investigation, we find reason left sufficient to retain the power of choice, and control of the reason over the will sufficient to make it obey, then the person charged is in the eye of the law responsible for his acts, and amenable to punishment.

Such is the rule which appears to me philosophical and easily intelligible. It should seem thence to follow that, though there be such a kind of insanity as perceptual, and also such a kind as emotional, yet that neither of them taken by itself, nor both together, can justly exculpate the offender, or relieve him from punishment. For example, if a person suffering under perceptual insanity thinks he sees an angel, and hears a voice as of the voice of God commanding him to kill his child, and acts in obedience to the supposed command, I insist that, nevertheless, he should be punished for it. So, if a person suffering under emotional insanity, caused by brooding thoughts of intolerable wrong, real or fancied, shoots his enemy in the street, I would deal with him in the same way; and so I would deal with one who, under a morbid, or, as it is sometimes called, irresistible impulse, pushes another over the side of a ship, or over a precipice. Such impulses should not be accounted uncontrollable. I commend the answer of that sturdy English Judge who, when told that the defendant had committed homicide under an irresistible impulse, replied that the law of England had also an irresistible impulse to punish him for it. Many persons have a morbid impulse to leap from a high rock, but they can restrain themselves. There are thousands who can not lean out of a window without feeling an impulse to throw themselves to the ground. The drunkard has a morbid impulse to drink. He who uses tobacco to excess is, in common parlance, mad for it, but none of them is beyond accountability for the indulgence of these impulses and desires.

The government of insane asylums is a standing contradiction of some prevalent theories respecting insane criminals. It acts upon the assumption that the unsound of mind are

influenced by motives, and can be restrained by fear. One of the most eminent of our physicians, on being asked by me whether the insane are not affected by the fear of punishment, answered: "Yes, there is scarcely one of them who, if he wasted his butter, and were told that if he wasted it again it would be taken from him, would not refrain from doing so."

Bucknill, on this point, makes the following observations: "On the other hand, freedom of will, the fountain-head of responsibility, is interrupted by the cerebral disease, but not wholly interrupted. If strong motives are addressed to the patient, he is capable of controlling the manifestations of the malady under which he suffers. 'I am convinced,' says Langerman, 'that even in the highest degree of insanity there still remains a trace of moral discrimination with which we may connect the train of the patient's ideas.' The extent to which the insane are capable of controlling their actions is conspicuous in the wards of a well-ordered lunatic asylum. The medical officers of such an institution find some two or three per cent of the patients whom no moral influences appear to touch; but the vast majority are enabled, with a little encouragement and assistance, to control their passions and emotions with nearly as much success as the people out of doors."

The law contradicts itself, moreover, in a remarkable manner. It will not excuse a man who violates it ignorantly, even though the act done be harmless in itself, as, for example, ferrying without a license, or buying lands in suit, both of which are misdemeanors; nor will it excuse one who, in a fit of intoxication, commits an act of violence upon another. The reason given for the former is, that all are bound to know the law, though ignorance may enter into the question of motive. He who does not know whether an act is contrary to law, has not a knowledge of right and wrong, as determined by the law in reference to that act. So the reason given for the latter is that the offender made himself drunk, but the punishment inflicted is not for getting drunk, for that is only a slight fine, but for the greater offense, the law taking no account of the mental disturbance which the intoxication has wrought. Then the insane are, with rare exceptions, admitted as witnesses;

but witnesses who swear falsely are amenable to the charge of perjury, and it would be absurd to allow one to testify, and by his testimony to cause another to lose his estate or his life, and yet, when the witness is called to account for his testimony, to excuse him on the ground that he was insane.

My position then is, that emotional insanity does not excuse an act otherwise criminal. In saying this, I consider emotional insanity by itself. I might say the same thing of perceptual insanity. Neither of these forms, considered by itself, or in connection with one another, exculpates an offender; but I by no means assert that either, or both, may not lead to or be mingled with those other forms of insanity which do exculpate.

The disrepute into which the defense of emotional insanity has fallen is owing to the fact that this form of the disease has been put forward as a defense by itself; but it must not be forgotten that it may and does often lead to the other forms, viz., those of intellectual or volitional insanity. Bucknill says: "Of late years the opinion has been gaining ground among the best psychopathsists that, with few exceptions, the embarrassment of the intellect is secondary and consequent upon the disorder and perversion of the emotive faculties. . . . Insanity is always in the first instance emotional. . . . Intellectual insanity is always secondary." And in another place he says, "Sound philosophy points to the emotive part of our nature, as the common if not the only source of mental disease."

Intent is a necessary ingredient of crime. There must be a union of act and intent. What is here meant by intent? Not the intention to do a moral wrong, as judged by the conscience of the actor, but an intent to do the act which the law pronounces wrong. This intent the actor must be capable of forming, before he can commit a crime and be justly subject to punishment.

It must never be forgotten that insanity is a disease, and whether it be scientifically accurate to say that the *mind* is diseased, it is true that whenever there is insanity there is a disease of the brain, so that, if the brain is not diseased, there is no insanity. This consideration disposes of all those cases

in which the act is done in the heat of passion or in a moment of frenzy. There are few homicides committed except in passion or frenzy. A murder in cold blood, deliberated on beforehand, is a rare occurrence; but no matter how hot the passion, or how fierce the frenzy, that is not insanity; and the question comes at last to this, Was there a disease of the brain? which is to be proved, like any other fact, by those competent to testify in the matter.

I can not leave the subject of this paper without expressing my earnest conviction that the knowledge of mental disease has now arrived at such a degree of accuracy that there should be a new classification of punishments. The present classification is a great improvement, doubtless, on its predecessors, which were the product of a ruder age; but we have not yet, by any means, reached that perfection of classification which the present state of our knowledge justifies and requires. The quality of the act, as measured by the degree of intelligence, should enter into the question of the degree of punishment, and, while it may be true, as I have already said I think it is, that perceptual and emotional insanity should not exempt from punishment, I still think that the punishment should be graduated more than it is, according to the mental condition of the offender. It does not accord with our notions of justice, that the strong and hardened ruffian and his weak and greatly tempted brother should, for the same outward act, suffer the same punishment. What I contend for is this, and this only, that emotional insanity should not exempt from punishment, and that so long as the law affixes only one degree of punishment to the outward act which the offender has committed, whatever may be the inward thought, that degree of punishment should be inflicted.

And I must also think that, whenever the administration of the law is brought to that state to which our advancing civilization must bring it, the question of insanity will be separated from other questions, and medical men will sit with the judges as assessors or experts, to aid in the decision, in some such manner as nautical men now sit in the English Admiralty upon cases of collision.

Having passed thus rapidly over this vast field of inquiry,



we are able, I think, to state the following propositions as the results :

1. Children under the age of discretion, idiots and imbeciles, are not within the discipline of criminal law.

2. The mental unsoundness of other persons, commonly designated as insanity or mania, is, in itself, or is attended by, disease of the brain, so that no heat of mere passion and no degree of mere frenzy can in any just sense be pronounced insanity by either of the professions.

3. That neither perceptive nor emotional insanity by itself, nor both together, can be accepted as excuse for criminal responsibility.

4. That intellectual or volitional insanity absolves from criminal responsibility when, and only when, the reason has lost either the power of choice, or the power of controlling the will.

5. That in every case of acquittal on the ground of insanity, the defendant should be forthwith placed in a lunatic asylum, and there kept until it is proved that he is restored to such a state of sanity as to remove all apprehension of a recurrence of the disease.

6. That the present gradation of punishments is unsuited to the present condition of medical learning, and a change is required which shall make the law punish, not only according to the harmfulness of the outward act, but according to the quality of the inward spring of action.

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# WILLIAMS, THE BEAUTIFUL.

## *A COLLEGIAN'S RETROSPECT.*

Address before the Adelpic Union Society of Williams College, July 5, 1875.

MR. PRESIDENT AND GENTLEMEN: Eighty years ago the Adelpic Union Society of this college, with a view to convenience, not less than emulation, was divided into two rival but friendly societies, one of which was named the Philologist, and the other the Philotechnian. The two were to have a common library, and to meet upon occasion under the old name. These societies have continued in unbroken succession for nearly three generations, and give signs of continuing for many generations to come. Each year, as a fresh class comes in, it is divided between the two societies. Well do I remember the bright autumnal morning after the blustering evening of my arrival, when it was announced to me that my lot fell among the Logians, and I was duly informed of the pre-eminence of that society above its rival—a pre-eminence which, of course, the first Technian I met vehemently disputed. Nevertheless, Logians and Technians, however divided in their several halls, were brethren when they met in a common assembly as they do now. The living members change with the years, but the stream flows on. To-night, undergraduates and graduates, the former in well-filled classes and the latter in such numbers as time and opportunity permit, are gathered together for one more reunion.

We, who have returned for the occasion to this well-beloved teacher of our youth, have come to recall and commemorate the past. We are thinking less of the new than of the old. We lay aside for the day whatever thoughts of the busy world outside might disturb the place or the time, while we revisit the scenes of college life, call up again the memories of those early and studious years, take one another by the hand, look

into one another's faces, listen to one another's voices, and rekindle sympathies dormant or forgotten. However long or short be the time since we went forth from the gates of this valley, however different our present circumstances, however divergent our several paths of life, we stand here as brethren. And are we not all brethren? The youngest among us is the comrade of the oldest, as the recruit of to-day in a regiment that bears upon its colors the names of a hundred fights looks upon the veteran as his comrade and himself as one of a line of soldiers, inheritor and partaker of their fame. So here, as there, the files are continuous despite the changes in the ranks. Once a year we have our muster, and though each roll-call, like that of the morning after battle, bears many a name to which there is no answer, our lines, however thinned, are never broken.

And now that I, a veteran of half a century, am speaking to my comrades, I ask them to look over the past with me. Not that I have anything new to show you, for you yourselves have been witnesses of everything that has happened. It may, nevertheless, be a pleasure to you, as to me, to recall and group together the great things that we have seen. What a faculty is this of memory! The sight of these faces, of these old roofs and halls, of these meadows and streams, and of these encircling hills, so quickens the inward sense that it sees forms that have vanished and hears voices that are silent forever. I behold my classmates as I beheld them then filing into the chapel, or gathered at recitations, or sauntering along the walks, or resting beneath the trees. I mark their gait, I hear their earnest debate, their hearty laugh, and I recall the strifes, the friendships, the greetings and the partings of those far-off days. I look into the sky—it is the sky of my boyhood; the stars clear and silent shine upon me and seem to say: "We shine upon you just the same as we shone fifty years ago."

We came as boys; we studied and contended with one another. No doubt of the future gave us disquietude. The hereafter was the land of promise, pleasant and fertile and bright with the dew of morning. The collegian is a dreamer, and, for the most part, a dreaming boy. He comes full of energy, incited by hope. He lays his hand upon the book of knowledge and opens it. What a revelation! The curtain is

lifted and a new world is spread before him. His mind quickens and expands like the mind of a child.

The new-born infant comes into the world with scarce a perception; the eye opens slowly, the ear catches a sound, the hands move to and fro; the mother watches hour by hour the growth of sense and intelligence: at first the face is a blank; now comes a faint expression; next a smile; then, as the eye feels the light, it looks into the mother's face, wanders from object to object; the hands stretch out to catch whatever is seen, near or far—the rattle or the moon—the lips try articulate sounds, and finally the feet lift the body, and the child walks.

See how it fares with the collegian. He comes full of life; his faculties, however strong, lie undeveloped; he is like the spectator in a theatre waiting for the scene, and so, with choice books and helping teachers, he finds in every lesson something new; the past opens its treasures and Nature reveals herself; the rocks become histories; the clods grow instinct with life; the streams pouring from the hills have something to tell; everything animate and inanimate reveals a meaning: the history of our race; its achievements in arts and arms; the great deeds done; the great books written; the great thoughts spoken and transmitted to us—all these are spread before him. Is it any wonder that the enthusiasm of the scholar repeats the enthusiasm of the child, or that the institution which furnished this teaching and opened the way to this revelation should be named *Alma Mater*, the nursing mother of one newly born into the world?

For my own part, I saw, and rejoiced as I saw opened before me, the literature and learning of the ancients, the exact sciences, and the wonders of physical and mental philosophy. I can remember, as of yesterday, the feelings which my first lessons in chemistry brought forth. The world had changed. Instead of a cold, inanimate nature, I saw that everything was alive. The trees seemed nodding to me as I passed; the air whispered in my ears; every blade of grass, every green leaf, opened its wonderful structure. The ground moved beneath my feet; the rain, the light, and the clouds brought messages, and even the solid rocks stood full of affinities, ready to dissolve

and form again in new combinations of their elements. Turning from the outward world to myself, I beheld the wonders of my own mind, that mysterious spirit which looks before and after, and to which we owe our reason and our affections. With these studies came the love of nature and the love of art, and communion through their books with the great souls of departed ages.

Was it not a great thing for us, that while we were shut from the outer world by these mountain barriers, we were shut within this valley? I shall never cease to congratulate myself that my sense of beauty was trained within the circle of these mountains; that the morning light gilded for my eyes the sides of Greylock; that I saw the sun at noon standing over this endless variety of wood, meadow, and stream; that the evening twilight heightened while it softened the beauty of noon; and that when I looked from my window into the moonlight, it lay like a transparent celestial robe upon the sleeping valley and the watchful hills.

So we passed our days. We formed a little community by ourselves. Our cares were few; our hopes many, and our friendships eternal. Factitious distinctions take no root in college ground. Nowhere else is character more truly measured; nowhere more than here is a sham found out. The words "college-mate, class-mate, room-mate," signify a great deal beyond ordinary fellowship. Two students sitting under the trees at evening, or walking in the moonlight, confide to each other their inmost thoughts. The heart is too fresh to doubt, too young to betray.

College life, though short reckoned by years, is long reckoned by impressions. These impressions are as ineradicable as the heart, whose pulsations begin and end with life. Go where you will—take the wings of morning and seek the uttermost parts of the earth—lose yourself in African jungles or South Sea islands, the memories of college days will go and abide with you. I have strolled along the Meles with a college-mate, and while we talked of Homer, who sang upon its banks, and of many other things, new and old, our thoughts reverted to the walks along the Hoosac, and we laughed as boys laugh over college anecdotes. I have stood on the slopes of Lebanon by

the side of an American missionary, and as we looked over the sea into the West, our thoughts outran our sight, and lighted on Williams the Beautiful, its historic Haystack and its Mission Park.

When the days of our college life were ended and we came forth into the world, the first quarter of the nineteenth century was just closing. It was the fiftieth year of American independence. The turmoil caused by the French Revolution had subsided; the temple of Janus, whose open doors had been so long the terror and affliction of Europe, was shut, and seemed to be shut for generations; a diplomatist had said, "There will be no more war in our day." Little did we think that the next two quarters were to bring forth the stupendous events that have come to pass—events that have wrought a revolution political and material in the affairs of men. But, before I speak of them, let me pause for a moment to speak of things private and personal to ourselves.

We parted from teachers and fellows with the salutation of all confident youth and bounded into the world. Some of us have succeeded, some have failed, none has done precisely that which he intended to do, or become that which he hoped to become. But each is the keeper of his own secret, and it must be left with him. The flow of one's inner life, the mental struggles, the hopes, the disappointments, are written only on the tablets of his own heart and in the great book of God. Self-communion indeed we need, and need it of all things most, but there, perhaps, we are most lacking. What have we gained or lost in self-knowledge; in self-reliance; in rectitude of purpose; in earnestness of endeavor? Have we practiced self-denial or self-indulgence? Have we lived generous or selfish lives? How have we borne ourselves in the memorable epoch in which we have lived, and what course have we taken in the ebb and flow of the world's movements? What part did we take in the civil war, or in the struggles which led to it? What have we done to make our government a blessing, to purify and exalt its administration, to enact wholesome laws, and to promote their faithful execution? What aid, in short, have we given to the forces of good, what countenance to the forces of evil?

No man can live only to himself. Whatever he may think of the life to come, he must know that his actions, by their own weight, and the force of their example, will affect the fortunes of those who are to come after him. Whatever his estimate may be of the value of an individual life, the continuity of the race is a fact sufficient of itself to engage his sympathies. By this I mean that each individual is related to all that have gone before and to all that are to come after, and, as one of the constituents in the great moving mass of human life, in some degree affects them all. No man is so insignificant but that he can do something for his fellow-men. Be his circle ever so narrow, he has the circle nevertheless, and within it can do some good or some ill. He is part and parcel of a great system of material and spiritual existence. He helps to make up the unity of the race. The vast current moves on, and, though he be but a particle in the waters, his place is there and he helps to fill the stream, which is ever running, ever changing, and is ever full.

A sentient being thus related has rights and duties derived from the relation. A father is bound to support and guide his son until the son is able to support and guide himself, and so each generation has not only to take care of itself, but, as it has been helped by the preceding, so it should help the succeeding. We say, and we say truly, that we are the heirs of all the ages—the inheritors of whatever is left of the works of our progenitors. How much, then, is it the duty of all of us to preserve and enrich the heritage, which we have received from our forefathers, and are to transmit to our descendants! It is the law of our being that we labor for “the posterities.” Our mother Earth, after we are forever laid in her bosom, will remain for the use of the living, and so on to the end of time. All the possessions with which the race has enriched the earth—the stores of learning, the treasures of art, the wealth of books, the cultivated fields, the pleasant homes—all these, by a sort of entail, a law of nature, written in the constitution of things, are inalienable, and no generation that lives, or has ever lived, or will live hereafter, has, or has had, or can have, the right to waste the inheritance.

Higher authority, indeed, than the unaided reason we have

for declaring that the love of man is the duty of man. "Thou shalt love the Lord thy God with all thy heart, with all thy soul, and with all thy mind. This is the first and great commandment, and the second is like unto it: thou shalt love thy neighbor as thyself." Nothing said or sung by sage or bard in the elder time, nothing taught by philosophers, ancient or modern, nothing enacted by lawgivers, old or new, nothing found in the literature of India or of Egypt, of Greece or of Rome, has ever equaled in sublimity or beauty, or in condensation of thought or language, these commandments of the Master, and His all-comprehensive commentary, "On these two commandments hang all the law and the prophets."

Passing from these reflections on personal and private experience, let us group together in the briefest space possible the public events that have most attracted the attention of the world since 1825. The first quarter of the nineteenth century, like the last quarter of the eighteenth, had been a period of storm and convulsion. The next fifty years—the middle of our century—were to become a period of reconstruction. In the former, the forces of disruption were at work tearing in pieces; in the latter, which I will call our epoch, the conservative forces of society have been working to rebuild. Let us glance at each of the five continents of the globe to see some of the great things that have happened there since 1825, and let us begin with our own.

This country has been the scene of most marvelous events. I do not speak of the enormous development in population and wealth, nor of the new States which have been brought into the Union one after another, nor yet of the war with Mexico and the acquisition of the territory consequent upon it, but of the civil war and the abolition of slavery. The like of these were never seen before from the foundation of the world. We can trace their history from the beginning to the end, mark every step in the great conflict of argument and of arms, and may well lay to our hearts the lesson, never to be forgotten, that injustice and oppression are certain to be avenged sooner or later, however the incredulous may scoff, or with whatever levity statesmen or politicians may treat the wrong. Slavery had been developed from a social to a politi-



cal institution. It had built up enormous power, and had treated its adversaries so haughtily that it shocked mankind by its audacity and brought down the maledictions and the arms which wrought at last its overthrow. Four millions of human beings, held as the property of other men—chattels, subjects of merchandise as if they were herds of cattle or bales of cotton—were emancipated, not by an autocrat, but by the people acting through their representatives, and a war was waged, where armies were counted, not by thousands, but by hundreds of thousands, amounting in all to millions, and the revolted States were encircled with a girdle of fire. For four long years the conflict raged with varying fortunes, but when at last the thunder of cannon, under which the earth trembled, on a line of more than two thousand miles, died away, the clouds cleared off, the sun came out, and lo! there was not a slave in all the land! Never had a people greater cause to chant, with voices reaching to heaven, these words from the grand old anthem of praise to the Almighty: "Praise him for his mighty acts" . . . "praise him in the firmament of his power!"

Throughout our sister continent of South America the ancient provinces of Spain have become republics, and, however awkwardly for the time they may work representative institutions, owing to their inexperience in self-government and their heritage of misgovernment, they are passing through an ordeal which tries as by fire the capacity of man for self-government, and have already called forth from a minister of state in the Commons of England the exultant boast that a power had been called into being in the New World which was yet to redress the balance of the Old.

In England, the country of our forefathers, the ancestral home of our language and our laws, though no radical change in the relations between the three great departments of government has taken place, there has been a radical change in the relations between the Parliament and the people. The elective franchise has been so broadened, and the proportion of representatives between the counties and the boroughs so changed, that the government of Victoria to-day differs as much in its spirit and responsibilities from the government of 1825, as that differed from the government of Elizabeth.

In France, the political pendulum which swung so high on the side of liberty first and license afterward in the last quarter of the eighteenth century, had swung back in the first quarter of the nineteenth almost to the absolutism and bigotry of Louis XV. Then came the rebound, when the nation threw away the elder branch of the Bourbons, accepting for a time the mild sway of the younger. This lasted hardly a score of years. Next came the republic, and then the empire of the third Napoleon, foredoomed to a mortifying and bloody downfall at Metz and Sedan. Now, there is again a French republic, working better and with auspices fairer than any government of the many which have by turns cursed and blessed the pleasant land of France.

In Spain, a government as weak and bigoted as was ever suffered to break the spirit of a people, had been restored by the arms of France, set on by the Holy Alliance, and in 1825 it seemed as if black night had closed upon the country of Cervantes. The new era, which the second quarter of the century brought in for the world in general, proved before its close a new era for Spain also. Revolt after revolt—one bad government giving way to another less bad—led by slow steps to a constitutional system, which, whether republican or monarchical, will never again give way to misgovernment like that of Philip II or Ferdinand VII.

The Austro-Hungarian monarchy has in these fifty years passed through trials the most perilous that ever threatened the existence of that conglomerate dominion; its discordant provinces have been alternately shaken together, then torn asunder, and then reunited; but these sore trials have made the empire of to-day renounce the despotic rule of 1825 and take its place by the side of the constitutional monarchies of Europe.

The Germans, the great central people of Europe, were divided and subdivided among princes great and small, and dominated by the houses of Hohenzollern and Hapsburg. A series of events, evoked out of the jealousies and rivalries of ages, led to a final struggle between these houses, which culminated in the battle of Sadowa, and established the preponderance of Prussia in the affairs of Germany. Four years later the war precipitated by France upon Prussia brought on a succession

of victories for the Prussian arms, the end of which was the enthronement, within the palace of Versailles, of the King of Prussia as Emperor of Germany.

The Italian Peninsula was divided also, like Central Europe, among princes great and small, of which one at the south, taking the name of his kingdom from the country's largest island, and the other at the north taking the name of his from the next largest, led all the rest in influence and power. The genius of Cavour, working upon the ambition of the third Napoleon, advanced the fortunes of the ancient house of Savoy, until the battle-fields of Magenta and Solferino rid the peninsula of the domination of Austria, and, that weight once lifted from the shoulders of the Italian people, the cohesive forces of speech and lineage, of a common history and a common destiny, brought Italy together into one free kingdom from Calabria to the Alps. For the first time since the republic of Rome was sovereign of the world, has there been one great and free state stretching from Mont Blanc to Mount Etna.

Two minor but most interesting states have appeared upon the map of Europe in the last half-century, one in the east and the other in the west—Greece and Belgium. A revolt of the Greeks against the Turks had broken out as early as 1820, but had made little headway before 1825, though the massacre of Scio, which took place in 1822, had aroused the indignation of Europe and America. The battle of Navarino, in 1827, destroyed the Turkish fleet; then came the presidency of Capo d'Istria, and finally the establishment of the kingdom of Greece; the crescent has departed from the Greek mainland never to return, and to be followed, I trust, by all the standards of Islam, until there shall not remain a foot of soil this side of the Bosphorus over which the false flag of the new moon can float. The debt which our civilization owes to the civilization of the Greeks, the modern world can never repay except by the establishment of a Greek state from Sunium to the Symplegades.

In 1825 the kingdom of the Netherlands was an ill-compacted state of two parts, differing in language and religion. The revolution in France of 1830, acting upon all who spoke

the French tongue, tore the two parts asunder, and the result has been two kingdoms: the old one, formed of the Dutch provinces, retaining the name of the Netherlands; and the new kingdom of Belgium. This new kingdom is one of the best governed and most prosperous countries of Europe. It is a satisfaction to those who believe in the progress of the race to see the fair and fertile land which witnessed the execution of Egmont and Horn, and the countless atrocities of the Duke of Alva (a name never to be mentioned but with execration), now writing upon the walls of its senate-house, "Religion is free."

On the Continent of Asia, the changes have been greatest in China and Japan. The latter, the Empire of the Rising Sun, as she is called by her own people, had been shut within her own fair islands for two hundred and fifty years, admitting only the Dutch to trade, and these only at one port, Nagasaki, in the west. In 1854 our own Commodore Perry forced the admission of Americans to Japanese ports, and this admission was followed by the admission of every other people. With a facility of change more remarkable even than their previous persistence in refusing all intercourse, the Japanese have copied American and European institutions and manners to such an extent that their ships, their arms, and their laws are framed after our models. The streets of their cities abound with foreigners, and their people are assuming, year by year, the dress and customs of America and Europe. China with her swarming millions has been compelled to open a score of her ports to foreign trade. Her people are emigrating to other lands, and she is arming herself as other empires are armed. Both countries are entering into the family of nations. Both avow themselves bound by the rules of international law; and I have seen representatives of both at the conferences of associations for the development of the laws of nations.

In Africa, both at the north and the south, a new power has been developed. In the south the English colony of the Cape has grown to such dimensions in territory and is increasing in population and resources to such a degree that it must soon become an empire in itself. At the north the corsairs, who for ages plundered and enslaved Christians, have been

extirpated; Algiers has been captured and colonized by the French; and Egypt, though yet in name a vassal of the Sultan, is independent in fact, and, lying in the gateway between Europe and the East, has grown to international importance unknown since the wars of the Crusaders and Saracens.

In Australia, a new world, newer than the Western Hemisphere, newer than the new world of Columbus, has risen into existence since 1825. Before then Van Diemen's Land, as it was called, had attracted some attention as a sheep-growing country, and Botany Bay, in Australia, had been made a penal colony. New Zealand was a country of cannibals. It was reserved for our day to bring the great Australian lands within the circle of Christendom. Now they boast a population of two to three millions, and are prosperous and free. As the voyager sails beyond the equator and sees the Southern Cross rising and flaming in the sky, he feels that he is in another zone; he sees a vast empire waiting to be possessed and enjoyed by his race; nay, he sees that there are already millions of free Englishmen, peopling at intervals the five provinces of Australia, the fruitful Island of Tasmania, and the double Island of New Zealand, where an English climate welcomes an English people. I could not help thinking when I looked upon the Australian banner with its device, "Advance Australia," that in the lifetime of a child already born a dominion facing the Antarctic would make itself felt in the affairs of the world, and that if I were an Englishman my heart would beat quicker when, among the titles of the chief of my country, I read Queen of Great Britain and Ireland, Empress of India, and Sovereign of Australasia.

Such are the greatest political events of the last fifty years. They are of such magnitude and such consequence, they mark so strong a current in a new direction of the sympathies and aspirations of mankind, and they promise such results for the future of nations, that we may call this half-century the epoch of political reconstruction. Further combinations may be made hereafter, but they promise to be in the same direction. The tendency of races to unite is so strong that when it is not counteracted by other forces, one people will not fail, sooner or later, to form one state, or group of states, bound together by bonds

more or less close according to their circumstances. For my own part, I look forward to some sort of a federation of all the English-speaking peoples; one of such elasticity as to admit into it the monarchical as well as the republican element. The disposition of the Slavic races to a combination is unmistakable. How the different populations of Eastern Europe, the German and Slavic in the Russian Empire, the German, the Magyar, the Slavic, and the Czech in the Austrian, the Bulgarian, the Roumanian, the Armenian, and the Greek in the other Danubian and *Ægean* lands—how these different populations will finally group themselves together is a problem partly of force and partly of diplomacy, but more of sympathy and interest, and we may assume that peoples of different races and languages can not always be held together by forts and armies.

These fifty years have, however, a still higher claim to distinction, as the epoch of a new movement toward the intercourse of man with man throughout all the world. I may call it the epoch of universal intercommunion. In this respect it stands out from all the ages that have gone before it. Should I be thought a dreaming enthusiast if I were to avow that this half-century appears to me like the morning star of a new day, the forerunner of a series of ages in which the barriers between the nations will be more and more broken down, and man will fraternize with man more and more under the whole canopy of heaven? It has brought to light three marvelous forces never before revealed, which more than any others, save only the Christian religion, promise the regeneration of mankind. These are the electric telegraph, the railway, and the ocean-steamer, to which I will add, as less important, but yet a great force in itself, the Suez Canal.

If the eloquent and venerable president who delivered our diplomas had added to the ancient formula these words: "Young gentlemen, take these diplomas and go forth into the battle of life; you will see in your time greater things done for the welfare of man than have ever been done since the beginning of the Christian era"; if he had told us that before our semi-centennial those things would happen which have happened, no one would have believed the prophecy, and we should have thought, though we would not have said, that

much learning had made him mad. Yet, having advanced fifty years, let us look back. In 1825 there was no electric telegraph, no railway, no ocean-steamer, and the Suez Canal was only the dream of enthusiasts. Now, in 1875, the earth is girdled with electric wires and railway-tracks, the sea is covered with steamers, and the Suez Canal is alive with the commerce of the East. Then our correspondence was carried on by post; our fleetest travel was with horses, and our fastest voyages in packet-ships sailing with the wind. The battle of the Nile, which was fought on the 1st of August, 1798, was not published in England until October, and the battle of Waterloo, fought on the 18th of June, was unknown in London before the 21st. Now we read every morning the news of the preceding evening from all quarters of the earth, and each one of us, before retiring to sleep, may learn what has happened during the day in London, Paris, or Constantinople, in the markets of China and Australia, and in the camps of Germany and France. We see great steamers passing and repassing on all the oceans of the globe, with the regularity of the pendulum, and as much larger and swifter than the sailing-ships of 1825, as these were larger and swifter than the "swift ships" of Homer.

It took me in 1835 three and a half winter days to travel by stage from New York to Albany. It takes me now three hours and a half by railway. When I was in college, if I wished to give my mother the latest news of her student son, I dropped a letter into the post, and it might reach her in two or three days. Now, if I would send a message to Southern Berkshire, I hand it in at a window, the lightning takes it, and, flying over the hills and along the streams, brings me an answer in, perhaps, as many minutes. We have here before our eyes a daily witness testifying to the material progress of our generation. The youth who in 1825 would come from the Connecticut Valley climbed the Hoosac range so slowly that morning brightened into noon and noon faded into evening before he set foot on this side of the hills; but now the iron horse, inanimate and untiring, with the strength of a giant and the submissiveness of a slave, supplanting the living and tiring horses of our fathers, and, unlike them, harnessed withal to

luxurious carriages, plunges into the foundation of the mountain, and in seven minutes stalks into this valley.

The sandy isthmus between the Red Sea and the Mediterranean had been from the earliest ages a standing impediment to commerce, and a challenge to the enterprise of man. Three times it is said to have been pierced by a canal, but the last and best, "the canal of the Prince of the Faithful," had long ago disappeared in the sands of the Egyptian desert. The genius of an illustrious Frenchman at length fulfilled the dream of ages, and great ships are passing and repassing daily between the Mediterranean and the Orient. If one could rise into the upper air, so high as to take the hemisphere into his vision, he would see country bound to country by iron chains, and continent almost joined with continent by the iron levitans of the sea.

These four miracles of science and art have been wrought in the brief period between the day of our departure from these halls and the day of our return to celebrate this fiftieth anniversary. How this progress will end, no foresight or spell of divination can foretell. We know only that a revolution has been wrought in the affairs of men, and that a new era has dawned, of which none of us dreamed when we passed into manhood, and the consequences of which lie in the womb of time.

It is impossible to make even the brief retrospect to which you have listened, without thinking of the retrospect which the class of to-day may be able to make fifty years hence. Our alumni, following the laudable custom of their predecessors, will doubtless continue to come up once a year to the commencement celebration. The youths whom we are to salute tomorrow, on their passing into the world, will, so many of them as shall then survive, come back in 1925, old men, with the traces of life's burden upon their shoulders. What will they be able to relate in their retrospect? Though it be not given to mortals to lift the curtain of the future, we may, nevertheless, speculate upon what is to come, or rather, I should say, we may reason from known laws, and to some extent infer the future from the past.

Let us, then, for a moment turn to face the coming ages,



that we may discern as much as we can of that which shall befall in the latter days. Latter days, did I say? There are no latter days, except as we measure the present with the past. Fifty years hence will be later than to-day, but fifty years more will be later still, and our generation, proud and boastful as it is, must in some future age be reckoned among the ancients.

Reasoning from the past to the future, what may we expect? There is, for instance, a law of increase in our population, and, taking the ratio of the last fifty years, we may safely predict that the end of the first quarter of the twentieth century will see a hundred and ninety millions between the two oceans. How far the material of this mass of people may be modified by the enormous immigration and the presence of other races, it is impossible to foretell, but we may venture to believe that the preponderance of the native Anglo-Saxon will preserve to us the same energy, the same daring enterprise, the same hardihood, the same love of adventure, and the same facility of adaptation to various pursuits, that now distinguish the inhabitants of these States; and that these qualities, coupled with the boundless resources which Providence in its beneficence has placed within our reach, will give to this nation, if it be true to itself, a predominant influence in the affairs of the world. I add the qualification that it be true to itself; by which I mean that it remain united, and be well governed.

That the union of these States will not be broken I am confident, and I wish I were as confident that they will always be well governed. The future of the country depends upon its laws and their administration, for, though the people are the source of all power, they speak in public affairs by their laws and their officers. With an honest government, administered in the spirit of its founders, and according to the fundamental maxims established by them, our institutions may last forever. If, however, the government were to be administered in disregard of its original Constitution, with an indifference to legal restraints, and shifting to the caprice of majorities, it could not, as it should not, last. Supposing Massachusetts, at the end of fifty years, to stand self-governed, making her own wise laws, and administering her own affairs, according to her own notions of what is good for her people, without interfer-

ence from other States or from the Federal Government, except in that limited sphere in which the latter is by the Constitution permitted to move, then Massachusetts will be as she is now, free; and upon the same conditions the other States will be free also, and the Union will be strong in the hearts of the people and strong before the world; but if there be found in future Congresses many members like the one hundred and thirty-five who in the last House of Representatives voted to clothe the President with power to suspend the *habeas corpus* (two members from Massachusetts, I am grieved to say, among them), then, indeed, shall we stand in peril. If these men, or any of them, are re-elected, their re-election will indicate an ignorance or an indifference in respect to our system full of danger to our institutions. For my own part, my faith is stronger than my fears, and I believe that the people will, as they must if they would save it, study their government more closely, watch it more carefully, and require of their servants more fidelity and more knowledge. We shall then exert a double influence upon the world, as much by our example as by the exertion of our power.

We all know that good government is not necessarily the concomitant of power, and we may have yet to learn that it does not necessarily follow from good laws. The noblest precept ever written in constitution or statute will be a dead letter if the living power be wanting. I am free only when my person and my property are beyond the reach of any force other than the law. The expressed guarantees of liberty may be copied in all the law-books of the land, they may be taught in the colleges and schools, they may be declaimed from the platform, repeated in newspapers, uttered in the streets; but if, by any action of anybody whosoever, I can be put beyond the equal protection of the laws; if I can be deprived of life, liberty, or property without due process of law; in short, if any person on earth can invade the sanctuary of my home, or take any of my property without legal warrant, I am not a free man, and my government does not give me the protection which is my due. I wish I could say that we have had this protection always, but truth and justice require the confession that some things were done by Federal authorities, during the

civil war and after it, which can not be justified, and the confession should be made with no uncertain voice, that the offenses may never be repeated. The things to which I refer are the arbitrary arrests during the war, and the military governments of the South afterward. It must also be confessed that in another respect political action during the last half-century has made a retrograde movement, for our politics are more demoralized, and the machinery of parties has fallen into worse hands, than ever before. It would be a foolish thing to deny or conceal the truth, because the truth will make itself known at last; and the surest way to heal a sore is to lay it bare and apply the remedy, however severe and whatever it may cost.

In the sciences and the arts who can foretell the progress yet to be made? May we not see the subtle but yet undeveloped power of electricity supersede the grosser power of steam, and a noiseless agent moving the machinery of railways and ships? Is it not possible that some future age may make the air a highway, as past ages have made the water and the land? Will not an early generation see ships passing through the Isthmus of Darien; the islands of the great South Sea peopled by the Caucasian race; our mother-tongue spoken by more lips than ever spoke another, and the inmost regions of Africa and Central Asia inviting the visits and the commerce of strangers? There are more readers, more students, more inventors, than were ever before, since the world began. What secrets of nature hidden hitherto from human eyes, what new instruments of research, what inventions for the lightening of labor, the succor of distress, the healing of disease, the increase of daily comforts, this army of thinkers and workers may yet bless the world with, no foresight can discern. But we may look confidently for new and great revelations, when we reflect that, with the three wondrous instruments that man has made unto himself, the telescope, the microscope, and the spectroscope, he has searched the water and the land, and, rising from the earth into the sky, has found out the elements of the sun, and looked into "Orion, the Pleiades, and the chambers of the south."

Passing by these considerations, however, as in part con-

jectural and speculative, we stand on firm ground when we consider the four great and active agencies which have been added to the forces of civilization in this our epoch. They lead irresistibly to a closer communion of the whole family of man, wherever placed or however scattered, and they will continue to afford, as they afford now, but increasing with the years, facilities for intercourse and interchange; the intercourse of man with man, and the interchange of all that he is able to produce with his own hands or to gather from land, sea, or air, for the sustenance, convenience, or improvement of his species.

We see, even now, as the first fruit of these agencies, a current setting toward the liberation, amelioration, and unification of all the races of men. Slavery is disappearing from the earth. Never before has there been an approach so near to the great truths—self-evident, but so long unuttered—which our immortal forefathers had the wisdom and the courage to proclaim: that all men have inalienable rights, among which are life, liberty, and the pursuit of happiness. There are eddies in the current, no doubt, but the stream runs on, swelling as it goes. There are in fact two currents, setting apparently in different directions, and yet both leading to the common good—one toward the fraternity of races, and the other toward the fraternity of the whole human family. By race I do not mean the variety, distinguished by color and features, described by naturalists, but a people with a common descent, a common language, and common sentiments. Both these tendencies are visible as the noonday. That which leads to a union of the same people under one government has been manifested in many ways since the beginning of this half-century. It was not so always. It was not long ago that the stream set toward segregation. Men were suspicious of each other; local habits and prejudices governed them; a river, or a chain of hills, or the rivalries of states and princes, divided people of the same lineage, as in the Germany and Italy of our days, and in the France and Spain of our forefathers. The tide now swells and rolls in the opposite direction. There is everywhere what, for want of a better expression, I may call the compressing force of national sentiment. I do not class it among cen-

tripetal forces, because it does not necessarily lead to strong central governments, but it tends to the union of the same people under the bond of a common government of some kind. The issue of our civil war, and the union of Germany and of Italy, are unmistakable signs of the rising tide.

The other tendency leads to closer international relations. The material forces which have now sprung into life are potent, not to say irresistible, agencies for this consummation. By them men are convened, as in one vast assembly. If not personally present, their minds are in company; they converse with one another; they reason together; they find that few are so bad as not to have some good, and that there is hardly a people or a tribe which can not contribute something to the enjoyment of mankind. Self-interest, not less than sympathy, is enlisted on the side of mutual intercourse, good-will, and friendly office. Thus it is that in our day there are so many international societies of different kinds; that the Caucasian, the Mongolian, the Ethiopian, and the Indian sit so often side by side in international conferences; that the study and development of the law of nations are so encouraged and pursued; and that so many minds are engaged in devising peaceful means of adjusting international disputes. It used to be said that "mountains interposed make enemies of nations." But mountains are no longer the barriers that they were; railways pierce them, telegraphs override them. Sentiment and opinion, after all, rule the world. The day of armed conflicts will have an end; it may be a long day yet, but the day is waning. A better way than war for deciding international controversies, a better argument than the sword, will yet be found; the time is surely coming when the words of the Psalmist are to prove true: "He maketh wars to cease unto the end of the earth; he breaketh the bow and cutteth the spear in sunder; he burneth the chariot in the fire."

The four great forces which I have enumerated, as newly developed in our epoch, tend all to one end, which is to bring men together. The telegraph enables me to speak with my friend on the other side of the globe, though mountains rise and seas roll between us. I can not touch his hand nor he mine, I can not hear his voice, I can not see him nor he me,

but our minds can meet; I can lay my heart to his, I can ask him questions, take his advice, express my sympathy and receive his, and these things make us one in heart and in hand, however far apart, and they redouble our power. My inward sense is so quickened by these marvelous revelations that I seem almost to see the multitudes in the streets of far-off cities, and to hear the voices in their exchanges, and the drum-beat in their garrisons. So it is that the telegraph, as the means of quick communication of mind with mind, the railway and the ocean-steamer, as the supplement of the telegraph, and the means of quick communication of persons with persons, have multiplied indefinitely the resources of individuals and of nations.

Yet not persons alone are to be carried from land to land, but things; the fabrics of men and the products of the earth. The industrial problems of our time are how to make labor most productive, and how best to distribute the results among all the children of men, that they may have food, shelter, and raiment within reach. More than half the land on the globe is waste or unoccupied, and more than half the products of that which is cultivated fail of distribution among those who need them. Men, women, and children are starving in some quarters of the globe, while there is abundance of food in others, which yet can not reach them for want of the means of circulation. But even this scourge of famine must at last disappear before these great and beneficent agencies, which the genius of our age has given into the hands of man; agencies which have already done, are now doing, and will continue to do, more to bring in that reign of peace and plenty, of which poetry and prophecy are full, than any others that have been brought to light since Christ was born.

Europe can not continue for fifty years to support armaments of present proportions. Their reduction must lead to international arrangements for the settlement of disputes; and among the achievements of the coming age I look confidently for a general treaty of the nations, adopting a plan of arbitration to settle disputes, relieve the world of the burdens of great standing armies, and reduce to the utmost the chances of war. This, I venture to believe, will be accomplished before the class of 1925 takes its leave of these halls.

I have said that I look for a federation of all the English-speaking peoples. When and how this will be brought about is more than I can venture to surmise. But of this I am confident, that such a federation would prove to be the most potent instrument ever yet contrived for promoting the peace, liberty, and order of the world. With a population already of nearly fifty millions, and swelling rapidly to more than a hundred millions, in these States, with thirty to forty millions in the British Isles, with the Canadian possessions of the English facing the Arctic, and their African and Australasian possessions facing the Antarctic; with their sway over swarming India, and their monopoly of islands all over the globe—what might not these nations, states, and provinces, if united by a bond strong enough to keep the peace between them, and withal so light as to leave them, in everything else, freedom of action; what, I say, might not these powers, with their Anglo-Saxon hardihood, accomplish for the good of the race? Peace, inward peace, “the peace of God, which passeth all understanding,” is the daily prayer of the Christian believer; and peace among the nations prophesied from of old, and so long waited for, will be, as I hope and devoutly trust, the outcome of the thought and toil of this and the incoming ages.

Turning now, in closing, to the class which is to leave us to-morrow, let me say, on behalf of my own class, that, while we have seen more than any of our predecessors, we trust that you will see more than even we have seen. There have been ages in which the world seemed to make no progress; there have been others when a century has been crowded into a decade. Our half-century has made a stride greater than any ever made before in the same number of years. If the marvelous changes which it has witnessed were to be undone; if by a sudden stroke of fate all the political and material progress we have witnessed, and all the contemporaneous discoveries in science and in art, were blotted out from the knowledge of man, we should feel the stroke as if the sun were stricken from the sky.

When you come here in 1925 to celebrate your semi-centennial, though you will find the face of the earth and the nature of man the same, I devoutly trust that you will see the

world more advanced from to-day than we see it advanced from the day of our graduation; that you will see it started on an assured career of peace; that you will see all those arts multiplied which minister to the comforts of man; that you will be able to welcome the class of that day on its entrance into the world with warnings less pronounced and words more hopeful than those with which we now welcome you, and, better than all, that you will see the nations everywhere assenting to the great fundamental truths which are the foundations of all hope and the guarantees of all prosperity—the fatherhood of God, and the brotherhood of man.



## JUDGE DAVIS AND HIS CONTEMPT PROCEEDINGS.

*To the Editor of the Albany Law Journal:*

SIR: From the moment when I heard, as I did abroad, of the action of Mr. Justice Noah Davis, with respect to the alleged contempt of his authority by counsel in the Tweed case, I determined to take some public notice of it, as soon as a suitable opportunity presented itself. On my return to this country I found the principal case still pending, which, in my view, made it improper then publicly to discuss the subject. The decision of the Court of Appeals, in the month of June last, has removed that impediment, and I am now enabled to say what I would have said earlier.\*

\* William M. Tweed was tried in the Oyer and Terminer of New York, held by Mr. Justice Noah Davis, upon an indictment containing two hundred and twenty counts, each charging him with misdemeanor in neglecting his duty as one of a board of auditors of claims against the county of New York. He was found guilty upon two hundred and four of the counts. Upon twelve of them the court sentenced him to twelve successive terms of imprisonment of one year each, and to fines of two hundred and fifty dollars each; and upon other counts to additional fines, amounting in all to twelve thousand five hundred dollars.

The maximum punishment prescribed by the statute for misdemeanor was one year's imprisonment and a fine of two hundred and fifty dollars.

The Court of Appeals in June, 1875, decided unanimously that all these sentences, except to one year's imprisonment and one fine of two hundred and fifty dollars, were illegal.

Two opinions were delivered, one by Mr. Justice Allen, and the other by Mr. Justice Rapallo. In the former are these observations: "I have thus, and at greater length than would ordinarily be deemed necessary, referred to the several cases cited from our own reports, and it will be seen that no warrant can be found in any of them, or in any remark, casual or otherwise, by any judge, for cumulative punishments upon a conviction of several offenses charged in a single indictment, the aggregate punishment exceeding that prescribed by law, for the grade of offenses charged." Again: "A greater public wrong would be committed, one more lasting in its injurious effects, and dangerous to civil liberty and the sacredness of the law, by punishing a man against and without law, but under color of law and a judicial proceeding, than can result from the escape of the greatest offend-

It gives me no pleasure to enter upon the discussion, but I do it as a matter of duty. If the judge was right, the profession and the public who are or may be suitors and clients, should know it, that they may govern themselves accordingly; if he was wrong, that also should be known, that his conduct may not be drawn into precedent, or repeated.

Though the conduct of judges is never above criticism, yet the nature of their functions makes the criticism of doubtful propriety, so long as an appeal to a higher court is possible; and even when that is exhausted, animadversion should be guarded, because, of all magistrates, the judge is least able to defend himself. He is, by the nature of his office, prohibited, except in the most extreme cases, from entering into a defense of his decisions.

But this general rule, like most general rules, has its exceptions. Publicity is allowed and required, because without it judges might become tyrannical and corrupt; but publicity, without the right of criticism, would be a mockery. A judge may so demean himself as to require animadversion. Impeachment is an extreme remedy and seldom resorted to, except when political considerations intervene.

If I use great plainness of speech, thinking that the subject and the times demand it, I hope not to overstep the limits of a just moderation. I have always thought, and I think still,

er, or the commission of the highest individual crimes against law. Neither the cause of justice nor of true reform can be advanced by illegal and void acts, or doubtful experiments by courts of justice, in any form, or to any extent. From some expressions of judges, and the remarks of text-writers, there was some color for the idea that several distinct offenses could be tried at the same time. But there was no real or true warrant in this State for several and distinct judgments upon a single indictment in the law."

In the opinion of Mr. Justice Rapallo the following occurs: "The generally accepted and recognized principle is, that a man shall be tried for only one crime at a time, and convicted only upon evidence of the commission of that crime, and not upon proof of other crimes which show him to be a fit subject for punishment. If it were proposed at a Court of Sessions or Oyer and Terminer, at which a prisoner was arraigned for trial upon fifty separate indictments for as many different offenses, to try all the indictments at the same time and before the same jury, the common sense of every layman, as well as lawyer, would revolt at the proposition; and yet it is claimed that the same result can be accomplished, in case of misdemeanors, by uniting all the charges in the same indictment. The evils are the same in both cases."

that the utmost courtesy is due from the bar to the bench, and, I may add, from the bench to the bar. The two must stand or fall together. It would pain me to think that anything I had said or done tended to impair the respect due to judicial authority. Not that I can pretend to respect all judges alike; I should be a hypocrite if I did. But, whoever sits in the seat of justice, should be there treated with the respect due to his place, if not to himself. He represents the sovereign authority, and it is before that I would bow, though I might dislike the person who for the time being represented it.

There are those who think that we are all the while going from bad to worse, and that under our system of electing judges by popular vote and selecting them by conventions packed with politicians and brawlers, the nominal judges will soon have the manners of prize-fighters and the learning of constables, while the real judges will be the newspapers, with a mob as assessors; but I am not of that opinion, though the signs of late are not encouraging. I think that the instinct of self-preservation and the love of freedom will yet arouse the people to a sense of the false security in which they lie dreaming. I am certain that—thanks to a favoring Providence overruling adverse circumstances—we have many judges who would illustrate any bench; that they who sit in the Court of Appeals, and a majority of those who sit in the Supreme Court, are above all suspicion, and worthy of all praise; true gentlemen, learned lawyers, and incorruptible magistrates; who would scorn dictation as they would scorn a bribe; who care nothing for arguments in the newspapers but much for arguments at the bar; and who bear with them an ever-present sense that they are trustees of God's great gift of justice, and judges of the law, upon their consciences and their oaths.

I will now gather together the essential facts of the episode in the Tweed trial out of which came the imputation of contempt. My objects are to give a true history of the occurrences, and to enter my protest against the action of the judge. The importance of the incident goes far beyond the counsel or the judge, for, as I have intimated, it concerns the relations of the bench to the bar, and of the bar to the whole community;

relations which lie at the foundation of civil liberty and social order.

The trial began on the 5th of November, 1873, in the county of New York, where, of all the counties in the State, the Court of Oyer and Terminer is held by a single judge. This happened through a change in the law made in 1853, which excluded the aldermen of the city, who, before that time, had seats beside the Supreme Court Judge, leaving one man only to hold the highest criminal court, while in all the other counties the judge of the same grade, that is, a judge of the Supreme Court, is flanked on either side by the county judge or a judge of sessions. This difference between the town and the country can be justified by one only of two alternatives: either that a Supreme Court judge sitting in the city is a better judge than if he sat in the country, or that it is not possible to find in the city two persons fit to sit with him. Judges of the Supreme Court, though elected by districts, are nevertheless judges for the State, and, to my way of thinking, their capabilities and their temptations are neither more nor less in the city than in the country; and they need assistance and it may be restraint in the city, or they do not need them in the country. The fact is, that the people of the city of New York, used as they are to misgovernment, have neither the rights nor the guarantees which belong to their more fortunate neighbors beyond Manhattan Island.

A law of the State requires that the judges, every two years, shall make and publish an assignment of terms, designating the judges to hold the various general and special terms, the circuits and Courts of Oyer and Terminer. This is required for two purposes: first, that there shall be no lack of a judge where a court is to be held; and, secondly, that the suitors and the public may know who are to hold the courts. It so happened that such an assignment had been made and published for 1873 and 1874, by which the Oyer and Terminer in the county of New York was to be held by Judge Barrett in October and by Judge Ingraham in December, 1873, the October term continuing until December. How it happened that Judge Davis came into the court instead of Judge Barrett I do not know. But I do know that the Code provides, section 26,

that "in case of the *inability*, for any cause, of a judge assigned for that purpose to hold a special term, or Circuit Court, or sit at a general term, or *preside at a Court of Oyer and Terminer*, any other judge may do so," and I know also that Judge Barrett is reported as holding courts in New York during November, 1873. Now, while I do not mean to intimate that any such thing has ever yet happened in the courts of New York, I do not forget that a member of the Federal Government once boasted that courts-martial were "organized to convict"; and I fear that under a system which may hereafter authorize a shifting of the scenes to suit a stage-manager, it may be possible to organize an Oyer and Terminer to convict, or a Circuit to shape a verdict.

On the 5th of November Judge Davis was in the Oyer and Terminer, sitting, as I have said, alone, when the case of Tweed was called. He had presided at a previous trial, in January, of the same defendant, upon the same indictment. On that occasion he had, as the defendant's counsel thought, borne upon the defendant with much severity. He had overruled point after point raised in his favor, and disposed of the gravest questions with great rapidity. One of his rulings at least was, in the opinion of the defendant's counsel, contrary to a previous decision of the general term, and the judge himself said that the question was "a most serious and important question in this case." His charge to the jury was delivered with an earnestness as remarkable as the gestures with which it was accompanied. The following are extracts from it: "If this position be true, and is consistent with the evidence, then it is very clear to my mind that these officers were guilty of neglect to audit, and are liable to conviction for that neglect. . . . The question of fact, then, becomes whether they did meet and audit, and upon that question comes in all the evidence of fraud in the accounts themselves, . . . because that evidence tends to show that what they did was intentional and with a bad motive, and for the purpose of accomplishing a bad end. . . . I call attention to a single transaction, and I think that brings the question in this case very sharply before you. . . . You must take into consideration the fact that he was a public officer, holding a high and responsible trust, and wheth-

er public officers, holding such high trusts, are to be held accountable for their proper fulfillment. Of what value, you may inquire, is it that we intrust public officers with duties that the people can not themselves perform, if they are not to be held to a strict responsibility? . . . In going over this evidence you will carry these suggestions into the jury-room, and tell, upon your solemn oaths, whether or not, under the proofs before you, there is or is not satisfactory evidence that Mr. Tweed neglected to fulfill the duty he owed the public, . . . and should bear in mind that there is no stain more deep and damning that a juror may bring upon his own character than by being false to his oath and bringing in a false verdict. . . . Now, gentlemen, I am asked to charge you upon various propositions by the defendant, and it is my duty to call attention to them in order that they may take exceptions if they desire, and to do it as briefly as I can. The first proposition is, that the questions of fact are entirely for the jury to decide. This is true. You are the judges of the fact. . . . Although you may be able to see, as I hope you are, that I have but one opinion of these transactions myself individually, yet you are not to be governed by that opinion at all. That opinion is not to be controlling upon you. If you think these things are just and fair, it is of no consequence that I think otherwise."

After the conclusion of the charge on the first trial, the defendant's counsel said, "I observe that in the first request there is quite a significant omission, and I ask the court—"

The COURT: "I did not charge in those exact words."

The COUNSEL: "Allow me to understand you. You charge that the jury are to find according to the evidence upon their own oaths, without any influence from the court whatever? We ask you so to charge."

The COURT: "I can not charge that. I charged as I have charged, and I decline to charge otherwise. They are the sole judges of fact."

The COUNSEL: "But without any influence from the court. If the court declines to charge that part, we submit, we beg leave to except."

The COURT: "I do decline to charge emphatically."

The jury disagreed, and were discharged.

Then the Legislature was induced to intervene. By a law passed on the 7th of May, 1873, which, if it be not, as I think it is, *ex post facto*, bears the evil consequences of such a law, the court, instead of outside triers as heretofore, was empowered to try challenges for favor. This law put it in the power of the court to affect in an extraordinary degree the selection of the jury. What the ablest and purest of judges think of retrospective laws is seen in the following passages from the opinions of Kent and Thompson, in *Dash v. Van Kleeck*, 7 Johns. 477 :

Chief-Justice Kent said (p. 505) : "An *ex post facto* law, in the strict technical sense of the term, is usually understood to apply to criminal cases, and this is its meaning when used in the Constitution of the United States ; yet laws impairing previously acquired *civil* rights are equally within the reason of that prohibition and equally to be condemned. We have seen that the cases in the *English* and in the *civil* law apply to such rights ; and we shall find upon further examination that there is no distinction in principle nor any recognized in practice between a law punishing a person criminally for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of the oppression, and history teaches us that the government which can deliberately violate the one right soon ceases to regard the other. There has not been, perhaps, a distinguished jurist or elementary writer within the last two centuries who has had occasion to take notice of retrospective laws, either civil or criminal, but has mentioned them with caution, distrust, or disapprobation."

Judge Thompson said (p. 499), "It may, in general, be truly observed of retrospective laws of every description that they neither accord with sound legislation nor the fundamental principles of the social compact."

Now it so happened that in June the counsel of the defendant, having some apprehension that a second trial was then to be brought on, with the same judge presiding, prepared and signed a paper, which contained what they would each say, if each could speak, and which was therefore the only means they had of communicating to him at once their united pro-

test against his presiding at this second trial. The paper was as follows :

" Court of Oyer and Terminer. The People, etc., *vs.* William M. Tweed. The counsel for William M. Tweed hereby respectfully present to the court the following reasons why the trial of this defendant should not be had before the justice now holding this court :

" *First.* The said justice has formed, and upon a previous trial expressed, a most unqualified and decided opinion unfavorable to the defendant upon the facts of the case ; and he declined to charge the jury that they were not to be influenced by such expression of his opinion.

" A trial by a jury, influenced as it necessarily would be by the opinions of the justice, formed before such trial, would be had under bias and prejudice, and not by an impartial jury, such as the Constitution secured to the defendant.

" *Second.* Before the recent act of the Legislature of this State providing that challenges to the favor shall be tried by the court, any person who had assumed a position in reference to this case and this defendant, such as said justice has assumed, would have been disqualified to act as trier.

" The defendant is no less entitled to a fair trial of his challenges now than he was formerly. What would have disqualified a trier then must disqualify a judge now.

" *Third.* Most of the important questions of law which will be involved in the trial have already been decided by the said justice adversely to the defendant, and upon some important points his rulings were, as we respectfully insist, in opposition to previous decisions of other judges.

" Although there may be no positive prohibition of a trial under these circumstances, it would be clearly a violation of the spirit of our present Constitution, which prohibits any judge from sitting in review of his own decisions.

" The objection to a judge, who has already formed and expressed an opinion upon the law, sitting in this case, is more apparent from the fact that in many States where jurors are judges of law as well as fact, he would be absolutely disqualified as a juror.

" DAVID DUDLEY FIELD,  
 " JOHN GRAHAM,  
 " WILLIAM FULLERTON,  
 " W. O. BARTLETT,  
 " J. E. BURRILL,  
 " ELIHU ROOT,  
 " WILLARD BARTLETT,  
 " WILLIAM EDELSTEN."

Two or three questions here present themselves. Supposing it permissible to object at all to Judge Davis sitting on



this trial, in what form more proper than this could the objection have been made? Should it have been made out of court? The proper answer to this question is Lord Mansfield's answer to the nobleman, who wished to speak to him about his case in the King's Bench; I quote from memory: "When a case is depending in court, I can hear nothing concerning it out of court." Should the objection have been made orally? I can not see how that would have been more respectful or less disagreeable to him. Was there anything discourteous in the language of the paper? I am unable to see anything. Then was it because the paper was untrue? That appears to have been the sore point with the judge. But the truth was a question of fact, and, if the counsel thought it true, its untruth could not have been a contempt. And most surely a judge, who immediately from the bench gave counsel the lie direct, should not be over-nice in matters of etiquette.

The question then arises, Was any objection at all permissible? Why was this judge there at that time? He had not been assigned to that duty, in the published programme. Where was the judge who had been thus assigned? Where were the other judges of the district? And if there was found none within it, willing or competent to undertake the duty, there were eight-and-twenty Supreme Court judges outside of the district, the equals of Judge Davis, and as fit as he to try the defendant. Was it just and fair to the defendant that Judge Davis should sit, and sit alone, upon his trial, after all that had happened? He had prejudged the case, prejudged its facts, and prejudged its law. This did not imply bad motive. The prejudgment was a necessary consequence of his having tried the cause once. It is not possible, so great is human infirmity, to divest one's self of such a prejudice. Is not an impartial judge as necessary to the pure administration of justice as an impartial jury? Nay, is he not more important? In the distribution of power between court and jury, has not the former the larger and the weightier part? The judge can grant a new trial in civil and in many criminal cases; the jury can not: the judge can admit or reject evidence; the jury can not: the judge can mete out the punishment; the jury can not. The sole judicial function of the jury is to decide questions of fact,

upon the evidence submitted ; their sole political function is to form a bulwark against the tyranny of the judge.

Finally, I ask, if there be any advocate, who bears the spirit of a man, who would not have made some remonstrance against the trial proceeding, under those circumstances? I hope, indeed, that no lawyer could be found within the State who would have quietly submitted ; but I know, if I know anything of the rights and duties of the profession, that no lawyer fit to stand in the courts as the advocate of suitors could be so false to his trust and so humble in spirit as to sit in silence, while this judge took his seat a second time for this trial, after what had occurred.

To test the question, let us suppose that now, in August, 1875, after the decision of the Court of Appeals, after the interview with Judge Davis reported in the newspapers, after the Davis and O'Connor correspondence—let us, I say, suppose, after all these things, that the trial of one of the untried indictments were to be brought on and Judge Davis were to appear upon the bench for the trial. Would not the whole world cry out against it? . . .

In most systems of law, exception to the judge is specially provided for. (See the Code of Practice of Louisiana, and the Code de Procédure Civile of France, art. 678.)

If it is not specially provided for in our system, it is, nevertheless, tacitly provided for in various ways. The self-respect of the judges, the spirit of the lawyers, the popular instinct for fair play, all combine to exclude a judge from taking any part in the decision of a case in which he is biased, or supposed to be biased. If he has been counsel in it for any of the parties, he declines to sit ; if he is connected by kinship or interest with any of them, he is prohibited from sitting. As men become more watchful and seek new guarantees, the rules of exclusion are widened. Our last Constitution has expressly prohibited a judge from sitting in review of a case once decided by him.

But what, if a judge, after all, has no delicacy restraining him, should an advocate do? I once asked that question of an English judge of one of the superior courts of Westminster. "What," I asked, "would an English barrister do, if a judge,

who had once tried a case and displayed a bias against one of the parties, were about to try it a second time?" "That is not a supposable case," was the answer; "no English judge would try a case the second time; his self-respect would prevent it; the traditions of the bar are against it."

What should an American lawyer do? Here is Mr. Wharton's opinion:

"We have, therefore, no direct precedent for the challenge of a judge, the remedy, in case of criminal partiality, being found in a motion for a new trial or in impeachment. . . . At the same time, when a judge is known to be corrupt or grossly prejudiced, the manly as well as the prudent course is to make the objection at the outset. If the judge persists, after this, in sitting in the case, and if the improper bias be capable of proof, much stronger ground will exist for revision of the case or for impeachment of the judge."

Probably every lawyer, in large practice, has had occasion, at some time, to make the objection. I will hereafter mention some instances.

When, however, the paper was handed to the judge, in the present case, he immediately took a recess, and returned into the private room of the judges. How many of them, and who, were present, I do not know; but rumor has it that several were present, and that all, with one exception, advised Judge Davis to treat the paper as a contempt. Whether this be so or not is unknown to me; but if any such advice, or any advice at all, was given, I must insist that it was very ill advised and contrary to law. I am not ignorant that many of the judges, and good ones too, have been in the habit of consulting their brethren before they decided cases before them. Even with such judges as sat in the Superior Court of New York, in those brilliant years when Oakley, Jones, Sandford, Duer, Bosworth, and Hoffman were there, the reports had often such notes as this: "The judges were all consulted, before the decision of this case, and agreed to it." Nevertheless, I repeat that this is an unsafe practice, and contrary to the spirit, if not to the letter, of the law. Our statutes declare that no judge can "take part in the decision of any question which shall have been argued in the court, when he was not present and sitting therein as a judge." In order to make out a violation of this statute,

it is not necessary that the absent judge should *appear* to take part in a decision : it is necessary only that he should influence it in some way by assent, suggestion, or advice. If he does no more than signify his approval after the sitting judge has rendered his decision, he does that which a good judge ought not to do—express his opinion beforehand of a case which may, perhaps, come before him for rejudgment. Of all places, a populous city, with a restless people, swayed back and forth by alternate gusts of sentiment, and passion, and reason, where many judges meet daily, in private chambers, forming little secret coteries ; of all places, I say, such a city has need of guarding the administration of the laws and the dispensation of justice from any influence, open or secret, other than that of the law and the testimony in open court. Judges are but men, and sometimes frail ones at that ; what they hear out-of-doors ought not to affect them, and much less what they hear in-doors in secret, especially when they but reflect back and forth upon each other the impressions they have gathered abroad. More than a hundred years ago, on the trial of Wilkes, when the defendant asked for the sentence of the court, “The court told him it was necessary to take some time to consider of it ; the constant course is so. They promised to do it without delay, and to give Mr. Wilkes notice when they were ready ; but at present they had not had the least conference together about the punishment ; *nor could they, without great impropriety, have had any before they had heard all the arguments.*” This happened in 1768. In 1873, after so many years of great advance, as we pretend to think, in civil rights, it happens, not only that judges whose right it is to sit, and who do sit, confer together before they have heard all the arguments, but they confer with those who have heard no argument at all.

The scene at the presentation of the protest is thus described in the “New York Sun” :

“On the formal opening of the trial Mr. Fullerton, after consultation with his associates, presented to Judge Davis a paper understood to be a protest against Judge Davis sitting to try the case. Judge Davis read the paper, and inquired of counsel what action they proposed should be taken on it.

“MR. FULLERTON : I suppose it remains for the court to say what ac-

tion be proper. It is suggestive on our part. Of course we can make no motion in regard to it. All that we could do was simply to present it for the court to take such course as seems right and proper in your judgment.

"Mr. Tremain requested that counsel for the prosecution be made aware of the contents of the paper.

"Judge Davis ordered it to be handed to him, saying: 'The gentlemen have handed me a paper, of which, of course, I am not qualified to form or express an opinion, although some of its statements are entirely inconsistent with truth, and must have been known to be so when presented. One statement is entirely untrue.'

"Mr. Tremain having read the document, returned it to the court, adding that it was an extraordinary time to present such a paper, after the case had been set down and called for trial.

"Judge DAVIS: I think it my duty, under all the circumstances, before proceeding, to consult with my brother judges, to see what course, with proper respect to myself, the court should take.

"Mr. W. O. BARTLETT: I wish to say one thing—if I have understood the remarks of the court correctly—and that is that we take no course with reference to the judge presiding in this case that we would not take if a saint from heaven were on the bench, under the same circumstances. We make no statement in that paper, and are incapable of making any, which we do not believe to be absolutely true.

"Judge DAVIS: It would be hard to convince me that the counsel or anybody else present at the former trial believes one statement in that paper to be otherwise than inconsistent with the truth.

"Mr. FULLERTON: Will the court be kind enough to say what that statement is?

"Judge DAVIS: It is unnecessary. I will take a recess, with a view of consultation with my brethren of the district as to the proper action to be taken to sustain the dignity of the court.

"Judge Davis's face was flushed when he ascended the bench after recess. He was evidently laboring under strong emotion, and could with difficulty control his feelings. He said: In respect to this extraordinary paper that has been handed to me, I and my brethren concur very fully as to the view I ought to take of it. I shall proceed with this case. Indeed, this extraordinary paper leaves me no alternative, if I have any self-respect whatever, but to go on; but I shall reserve for a future occasion such proceedings as in my judgment are required to vindicate the dignity of the court, and of the profession itself, from what I deem a most extraordinary and unjustifiable procedure.

"Mr. W. O. BARTLETT: I did not hear the last words, if your honor please.

"Judge DAVIS (pale, and knocking with the gavel): Sit down, sir! I have examined the charge given by myself, and it nowhere sustains any part of the statement, which I find to be unfounded as it is untrue. No

further notice will be taken of this paper at present, but such action as may be deemed proper will be taken hereafter. Proceed with the case.

"Mr. GRAHAM: I wish your honor would permit an explanation now.

"Judge DAVIS (interrupting): I can not allow any remarks on the subject.

"Mr. GRAHAM: All I ask is an opportunity to show that the facts alleged in that paper are true.

"Judge DAVIS: No, sir.

"Mr. GRAHAM: You say, in the presence of the jury, that we have departed from the truth; and I say, in presence of my Maker, that I have not departed from it.

"Judge DAVIS (rapping with his gavel): Counsel need not have any fear but that an opportunity will be afforded them.

"Mr. GRAHAM (after a brief and whispered consultation with the Messrs. Bartlett and ex-Judge Fullerton): Will your honor allow us an opportunity to consider whether, after that disparagement, we ought not to retire from the case?

"Judge DAVIS (quickly): This case must go on. It must go on.

"After another brief consultation with Mr. W. O. Bartlett, Mr. Graham said: Not knowing what the court's action will be, whether it would adjudge us in contempt or not, we ask an opportunity to send for counsel, and put ourselves under his direction.

"Judge DAVIS: Have you any question to make in respect to these proceedings?

"Mr. GRAHAM: I have this to suggest in advance—whether we ought not to have time to consult with counsel as to the course we should choose to take with respect to Mr. Tweed. If we determine to desert him now, it will be impossible for him to supply himself at once with counsel competent to carry on his case.

"Judge DAVIS: This case must proceed, sir. I shall give no time for counsel to mutiny against their client.

"Mr. GRAHAM: If we are entitled to an exception, I respectfully take an exception. I except to the remarks of your honor, and especially to the word 'mutiny.' My oath knows no such word as 'mutiny.'

"Judge DAVIS: No exception can be allowed. I told counsel in advance that no action can be taken on this paper until the trial is closed.

"Mr. GRAHAM: We except, if an exception is worth anything.

"Mr. W. O. BARTLETT: The only point, your honor, is that you leave us to go through the trial resting under an imputation that we feel to be unjust. Will you not, from a sense of fairness, give us an opportunity to vindicate ourselves to your honor—not to any one else but your honor?

"Judge DAVIS: No action can be taken on that paper at present. The trial must go on. If counsel remain under an imputation through the trial, counsel may as well respect the fact that the court remains under an imputation also.

"Mr. GRAHAM: The court can serve us both by granting us a hearing now.

"Mr. W. O. BARTLETT: Is that decision so fixed that you will not hear reasons which, in fairness to us and justice to yourself, you ought to hear?

"Judge DAVIS: I wish to hear nothing more on that subject. Counsel will have both time and opportunity hereafter. You must go on with the trial.

"Mr. W. O. BARTLETT: We fear it will injure our client."

The trial then proceeded and resulted in the conviction of the defendant. The judge thereupon pronounced fifty-one different sentences, amounting to an aggregate of twelve years' imprisonment and twelve thousand five hundred dollars' fine, though upon the first trial it was generally understood that the indictment was to be taken as an entirety, capable of sustaining but one fine of two hundred and fifty dollars and one year's imprisonment.

The trial being thus ended, the judge, addressing the counsel, said: "During this case an occurrence took place that I gave notice would be taken into consideration after the close of the trial. If it will be convenient to deal with it on Monday, the court will enter upon the inquiry. The matter is in relation to the action of counsel at the beginning of this case. They will easily understand to what I refer."

On the Monday the counsel were not ready, and the matter was postponed to the following Saturday, the judge meanwhile making some observations, among which were the following, according to the report in the "New York Herald":

"Now, the objection to the paper lies, first, in the apparent object, which I am bound to suppose till something appears to the contrary, was that the presenting of the document signed by distinguished and numerous counsel—there are eight signatures here—would have the effect, from this statement, to so intimidate the judge who was about to try the case that he would not perform the duty that the law devolved upon him, but would leave the bench for some other judge. That is the first apparent intent. The second apparent intent of this paper, to my mind, is, that it would be spread upon the records and published in the papers; a formal and formidable document, proclaiming before the public of this county, from which the jury was to be drawn, that the judge presiding at the trial was partial; had expressed his opinions of hostility to the individual on trial, and his opinions upon the facts against the defendant, and had ruled upon the various propositions of law arising in the case against the

defendant, contrary to the decision of other judges, and was, in short, because of prejudice and partiality and personal ill-will to the defendant, not a proper judge to sit in the case. The statement thus laid before the public would have a serious influence upon the minds of those liable to be called to sit in the jury-box in case the judge persisted, notwithstanding the paper, in going on with the case. Thirdly, it was what the law does not and can not recognize, an attempt to challenge off the bench a judge whose duty placed him there for the occasion as the presiding officer of the court—an innovation of the law and practice that had previously existed—and upon grounds not at all tenable, in view of any established rules of law. The paper contains objectionable matter, impugning, as I think, upon erroneous grounds of fact, the past conduct and present position of the presiding judge. It first declares that 'the justice had formed and, upon the previous trial expressed, a most unqualified and decided opinion, unfavorable to the defendant upon the facts of the case.' That statement is not correct in point of fact. The judge expressed no opinion upon the facts, and, although the judge charged the jury in such form that it was probably impossible that they should not see what his opinion really was, nowhere in the charge can be found any expression of the opinion itself, and so far from infringing upon the right of the jury to pass upon the facts, the judge expressly warned them that his opinion must not govern their action in any degree; that they were to determine all questions of fact for themselves, although they could not fail to see what the opinion of the court was." . . .

On the day appointed the counsel appeared and submitted a paper, drawn up in courteous terms, disclaiming any disrespect to the court, and at the same time claiming to have done their duty and nothing more. Thereupon the judge spoke as follows, if I may rely on a report which I find in the "New York Times." I should like to copy the whole, but there is not room in this letter, and I must limit myself to extracts :

"This paper then says that 'he declined to charge the jury that they were not to be influenced by such expressions of his opinion.' That I characterized, when this paper was brought to my notice, as an untrue statement. . . . If the original paper had been handed or sent to me privately, or out of court, so that I could regard it as to me only as a judge or as a private citizen, I should be willing to adopt the views and suggestions of the learned counsel in respect of its objects and purposes. Indeed, if it had urged me under such circumstances it would have dropped silently into oblivion. . . . Looking at this whole paper, and it is an extraordinary paper, I am at a loss to see on what possible grounds counsel can justify its presentation to the court under the circumstances. It struck me at the moment, as it strikes me now, as



an effort to induce the judge, before whom that case had been moved, to leave the bench and surrender the position in which he was sitting; in short, by the combined effect of the names of a large number of eminent counsel, intimidate the court from the performance of the duty the law and the Constitution devolved upon him, notwithstanding the statements made. Receiving them, as I mean to do, with all respect, I can not but remain in the belief that, in the extraordinary case depending before this tribunal, counsel thought it possibly their duty, but thought it a part of their professional tactics, which a great exigency justified, to drive, if possible, from the performance of his duty, a judge who they feared might be sitting to hold the court. I have no hesitation in saying that it is my firm conviction that if such a paper as that had been presented to one of the tribunals of England at this hour, clothed as those tribunals are with power, which the laws of this country withhold from its judges, not one of the counsel who signed that paper would be sitting before any tribunal to-day, and not one of them would find his name upon the roll of lawyers, or barristers, or counselors, of that country a single hour after that paper had been presented. . . . And I feel it my duty now in this case—while I will do nothing harsh or unkind whatever—to make the mark so deep and broad, that if it has been heretofore, as has been insinuated, the custom to drive judges from the bench by the presentation of such documents, or by the oral presentation of such suggestions, the boundary between the past and the present shall not be unobserved; but, on the contrary, all members of the profession shall know that at least hereafter such efforts are obnoxious to censure and punishment. I have no disposition to do anything to degrade either of the gentlemen before me. I shall not do that. I shall not commit either of them to imprisonment, but I deem it my duty to impose a fine upon some of those gentlemen to the extent the law permits. I shall impose upon John Graham, William Fullerton, and William O. Bartlett, a fine of two hundred and fifty dollars each, and order that they stand committed until the fine be paid.

“In respect to the younger gentlemen of the bar, whose names appear in this paper, Elihu Root, Willard Bartlett, and William Edelsten, I have this to say: I know how apt young counsel, when associated with more experienced and distinguished gentlemen, are to follow their lead rather than to act upon their own judgment. I know it from my own experience; and I am fain to believe in this case that neither of those gentlemen, of his own motion or suggestion, would have felt it his duty to have presented such a paper as this to the court. Mr. Edelsten did not take any active part in the trial, therefore I do not speak of him. I have concluded this, in respect to these three gentlemen: That I will impose upon them no penalty except what they may deem such in these few words of advice. I ask you, young gentlemen, to remember that good faith to your client never can justly require bad faith to your own consciences; and that however good a thing it may be to be known as successful and great lawyers, it is even a better thing to be known as honest lawyers” (great

applause), "and there is no incompatibility whatever in the possession of both of these characters."

This address was delivered in a crowded court-room, filled chiefly, it is said, with young lawyers. One of the newspapers makes this mention of it: "Judge Davis then decided the case in an address from the bench. He was once or twice interrupted with mild outbreaks of applause, which he did not attempt to stop or rebuke." . . .

I will not stay long to comment upon the strangeness of this language or the indecency of the scene. When the judge told the counsel what would have happened to them under like circumstances in England, he betrayed a recklessness of assertion and an ignorance of history quite astonishing. He knows little of the English bar, who thinks that an English barrister can be disbarred by an English judge. An advocate at Westminster holds his franchise upon the grant and subject to the control only of his peers. The judges can not give it; the judges can not take it away. Not one of them has anything to say on the subject, except that the lord chancellor can hear an appeal against the decision of the benchers, taken by one whom they have voted to disbar.

That the young lawyers who applauded so tumultuously were as ignorant in this respect as the judge, is not to be wondered at; but that they were so mean-spirited as to rejoice in an attempt to humiliate their brethren is most strange. Let me hope that they will live to learn more and truckle less, and when they think of the scene again, if they are incapable of blushing, let them strike their cheeks, with the same vigor with which they struck their palms on that occasion, and produce at least the semblance of a blush.

They had, however, this poor excuse. Their young minds had been wrought upon by the frantic though futile attempts of an ignorant and depraved portion of the public press to intimidate counsel in the discharge of their duties; journalists were more to them than jurists; they had rather consort with Bohemians than with barristers; they had leaned on the emptiness of Mr. Edwin Godkin; . . . and drunk at the turbid little fountain of the youthful Adamases (*arcades ambo*), into whose stagnant pool

the once vigorous "North American" has fallen in its sad decrepitude.\*

The question of veracity is easily settled. If I understand the judge correctly, he asserts that the paper submitted to him was false in two particulars: one, in stating that he had "expressed a most unqualified and decided opinion unfavorable to the defendant upon the facts of the case"; and the other, in stating that he "declined to charge the jury that they were not to be influenced by such expression of his opinion." Who, then, was right, the judge or the counsel? The answer is contained in the reports of the first trial, from which I have before made extracts. The following is from the notes of a short-hand writer, a part of which has been already quoted: "Now, gentlemen, I am asked to charge you upon various propositions by the defendant, and it is my duty to call your attention to them, in order that they may take exceptions, if they desire, and to do it as briefly as I can. The first proposition is, that the questions of fact are entirely for the jury to decide. That is true. You are the judges of the fact. Upon you devolves the responsibility of saying what the evidence proves or fails to prove. I have only sought to lead your minds to that evidence, and to the questions which arise, leaving it for you to determine what are the facts based upon that evidence. *Although you may be able to see, as I hope you are, that I have but one opinion of these transactions, myself individually,* yet you are not to be governed by that opinion at all. That opinion is not to be controlling upon you. If you think these things are just and fair, *it is of no consequence that I think otherwise.* You have the responsibility upon your oaths."

What the judge meant by the opinion of himself "*individually,*" is not very clear to me. Had he an individual opinion, and also a public or judicial opinion? If he were a dual person we might understand him. But letting the individual part of it go for what it is worth, the passages above given in italics contained three propositions: first, that he had an opinion, and but one opinion, of the transactions; second, that he hoped the jury were able to see that he had it; and, third, that he thought

\* This, of course, refers to the "North American" in its then condition. It has since passed into other hands and recovered its former vigor.

they were thus able. To have but *one* opinion is to have, not a balanced opinion, not a preponderating opinion, but "a most unqualified and decided opinion," that is to say, an undoubting conviction. If the jury were able to see that he had it, he must have expressed it, unless they had power to look into his unopened mind, and, when he hoped that they were able to see it, he expressed, I think, not only his wish, but his belief, that he had said enough to make them see it. In one respect, I am inclined to be more tender of the judge's reputation for consistency than he is himself. I should be very sorry to have him understood as saying to the jury: *Gentlemen, I have expressed no opinion; I do not mean to express an opinion, but you may be able to see, as I hope you do, that I have an opinion and but one opinion: but that opinion, which, remember, I have not expressed, is not controlling upon you; you are not to be governed by it.*

So much for the first point of veracity. Now for the second. The defendant's counsel did not doubt that the judge had expressed a most decided opinion upon the facts against the defendant, but they were not certain that his omission of an essential part of the first request was intentional. That request was, that he should instruct the jury that they were "to find according to the evidence, upon their own oaths, *without any influence from the court whatever.*"

The judge took this up, but, instead of putting it as requested, he said: "The first proposition is, that the questions of fact are entirely for the jury to decide. That is true. You are the judges of the fact," etc. The defendant's counsel called his attention to this change of expression, in order to learn whether it was intended. Hence the colloquy that followed in these words:

THE DEFENDANT'S COUNSEL: "If the court please, I feel it my duty to take exceptions to the charge." THE COURT: "I will consider your exceptions as taken in the case of each one of these requests, when they are denied." THE COUNSEL: "If there is no misunderstanding, that is quite sufficient for me. I observe that in the first request there is quite a significant omission, and I ask the court—" THE COURT: "I did not charge in those exact words." THE COUNSEL: "Allow me to

understand you. You charge that the jury are to find according to the evidence upon their own oaths, without any influence from the court whatever? We ask you so to charge." THE COURT: "I can not charge that. I charge as I have charged, and I decline to charge otherwise. They are the sole judges of fact." THE COUNSEL: "But without any influence from the court. If the court declines to charge that part, we submit, we beg leave to except." THE COURT: "I do decline to charge emphatically."

Could language make this plainer? To tell the jury that they were judges of the fact, was but to tell them what everybody knew; to tell them that they were not to be *governed* by his opinion at all, was but to tell them that he could not order them to find a verdict of guilty; to tell them that they were to find according to the evidence, upon their own oaths, *without any influence from the court whatever*, was a very different thing, and that he refused to do, and his refusal in the face of the jury was equivalent to an intimation that they *might* be influenced by his opinion.

Now the *propriety* of the judge's expressing his opinion to the jury upon the facts, and of his refusing to instruct them that they were not to be influenced by that opinion, is one thing, not at all pertinent to the present inquiry; the *fact* of his having done so is another. That he has denied, and that, I think, I have proved.

The judge dwelt upon the action of the counsel in submitting the paper as an attempt to intimidate him and drive him from the bench. It could not have been intended to drive him from the bench and intimidate him on it. As to driving off, if by that expression he meant the substitution of another judge for him in the trial of this case, the wish to do that is manifest; but if it be meant that there was anything in the proceeding justly offensive to the judge, then it must be said that neither did the counsel intend it, nor could he properly so regard it. They meant no more than is always meant when it is suggested to any court that one of its members is disqualified in the particular case. It is every day's practice to do as much, when a judge has heard the case or some part of it in the court below, or is in some remote way interested in the re-

sult, or when at the bar has been consulted upon the question. It is every day's practice to object to a juror who has tried the case once. Why? Are not jurors often men of as nice a sense of justice and honor as judges? And is that an offense, when spoken of one, which is proper and laudable, when spoken of the other? One is apt to lose patience, listening to the sophistry of judges who think themselves superior to the ordinary weaknesses and temptations of mortals, and try to persuade other men that they are so. Of all cant, that is by no means the least which is uttered by the judge who pretends, that though he has formed an opinion and expressed it, he is nevertheless impartial, and is just as ready as any other man to form and express the opposite opinion! It may seem very satisfactory to the judge himself to say, as is often done, that no man is fit to be a judge who will not admit himself to be wrong, when he is shown to be so. The proposition may be true, but its practical application is next to impossible, because you can rarely show him to be wrong. The truth is, that judges have the same pride of opinion, the same love of power, the same restlessness under constraint, the same likes and dislikes as other men, and there is not a single reason for demanding an impartial juror that does not demand an impartial judge. You may test the question in this way: ask the judges who are so confident of their own ability to remain impartial, after they have once made up their minds, whether they would like to be tried by a judge who had once tried them, and expressed himself decidedly against them.

In all the reports of the judge's address, I see no allusion to the question of his power to treat the handing up of this paper as a contempt. And yet this question was the first for him to consider. He had no power in the matter, except as he received it from the statute, and the statute, the whole of it, is this:

"Every court of record shall have power to punish, as for a criminal contempt, persons guilty of either of the following acts, and no others:

"1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

"2. Any breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

"3. Willful disobedience of any process or order, lawfully issued or made by it.

"4. Resistance willfully offered by any person to the lawful order or process of the court.

"5. The contumacious and unlawful refusal of any person to be sworn as a witness; and when so sworn, the like refusal to answer any legal or proper interrogatory.

"6. The publication of a false or grossly inaccurate report of its proceedings; but no court can punish as a contempt, the publication of true, full, and fair reports of any trial, argument, proceeding, or decision had in such court."

Under which of these heads can the handing in of this paper be brought? The writing of it, the sending of it to the judge's house, the printing of it in all the newspapers, could not have been construed into a contempt, though such acts would have been more likely to intimidate him or drive him from his seat than quietly handing it to him. Where was the contempt, then? Handing the paper to him in court? Was that disorderly, contemptuous, or insolent behavior, tending to interrupt the proceedings of the court, or impair the respect due to its authority? If it be, counsel should stand on their guard. There are many occasions when a judge is expressly prohibited from sitting. If, for example, he should happen to be of kin to one of the parties in the ninth degree, and counsel should suggest the relationship in a quiet way, orally or in writing, might the latter be committed for it? Suppose the judge to deny the relationship, would his denial be conclusive; and if he committed for contempt, would all other judges be forbidden to entertain the question of fact? Many similar suggestions may be made. Indeed, the extravagant pretensions of Judge Davis would lead, not only to intolerable oppressions, but to the most ridiculous absurdities.

Suggesting to a judge that he should not sit in a particular case, is not such an uncommon thing that he need be touchy about it. He would, in my opinion, best consult the dignity of his court, and his own self-respect, to say nothing of the respect of others, by yielding gracefully to the suggestion. That would imply no consciousness of disqualification or bias, but simply a desire to remove all impressions from the minds of the parties that they were not to have a fair trial. The im-

pressions might be well or ill founded, but they would none the less exist, and it is important to the successful administration of justice that it should be not only pure but unsuspected. Of course, if the suggestion were made in an insolent manner, the insolence would deserve censure, and the judge would rebuke, or, if you please, punish it. That is a very different thing from rebuking or punishing the suggestion. One would suppose that a conscientious judge would desire to be relieved of a disagreeable task. If one wished to try a cause, that would be proof that he ought not to try it.

Every lawyer of considerable practice must have had occasion to make the objection. Mr. James T. Brady objected to Judge Roosevelt sitting in the Herrick case, eighteen or twenty years ago. Messrs. Tracy, Smith, and Peckham objected to Judge Barnard's sitting in the Ramsey case, and, although he persisted, Judge Brady, on another ground I think, set aside his order. I objected to Judge Oakley's sitting in *Fry v. Bennet*, because he had tried it before, and that most upright and able judge, who was not slow to uphold the dignity of his court, took no offense. The case is reported in 3 Bosw. and 18 N. Y. R. I objected in the Court of Appeals, on two occasions, to a particular judge sitting in the Albany and Susquehanna case.

In the course of Judge Davis's address, from which I have quoted so largely, he alluded to me personally, intimating, in his pleasant way, that a long distance lay between me and danger, he being all the while as far from me as I from him. I have been now several months in my own country, state, and city, and although I am obliged to go abroad again for a few weeks, I expect to return about the first of October. While I am by no means fond of controversy,\* I do not decline it when pressed upon me, and if Judge Davis still thinks that he can punish me for contempt, I am ready to try conclusions with him whenever he sees fit.

NEW YORK, August 2, 1875.



## AN EX-GOVERNOR'S THEORY OF A LAWYER'S DUTY. .

*To the Editor of the Albany Law Journal:*

SIR: The lecture with which, in the beginning of January, ex-Governor Dix favored the New York Association for the Advancement of Science and Art, contained a passage which, though it concerned lawyers, I do not think that any lawyer has yet taken notice of. In the absence of a better critic, and for the reasons hereafter mentioned, I am inclined to do it the service myself. In the course of a discursive comment on political and social evils, including the reëligibility of the President, the abuse of official trusts, the defective distribution of offices, the election of judges, free-love and divorce, with examples of public demoralization, followed by remarks on the public-school system, the duty of citizens, and general views of human life and government, the lecturer, apparently finding it impossible to keep Tweed out of mind, took occasion to say that "it is not at all creditable to us that he has used the money of which he robbed the city to subsidize the highest legal talent in the State to screen him from punishment."

While I would not have it supposed that I attach special importance to this language, or, for the matter of that, to the residue of the lecture, which, though respectable in its way, will hardly disappoint the most indolent lover of well-phrased commonplace, yet looking upon it as the logical result of a theory of legal ethics, lately propounded, which is at once false and unsafe, I am disposed, before it is forgotten, to take the language I have copied as a text for a sort of lay homily appropriate to the times. This language is both a symptom and a sample: a symptom of that morbid condition of mind which makes it jump at conclusions without stopping to reason; and a

sample of the thoughtless fault-finding and inquisitorial inter-meddling with other people's affairs, quite too common in these days.

Though I happen to be one of the persons whom the lecturer would embrace within the scope of his censure, I can hardly refrain from observing that he will find us to be a goodly number, however little of good he may think to find in any of us separately considered. From first to last, some twelve to fifteen gentlemen have been guilty of the enormity of taking retainers for Tweed. Perhaps the Governor would like to know their names.\* Some of them venture to hold up their heads in the world, and might not feel unduly elated if they should chance to find themselves alongside of the ex-Governor himself.

Four distinct propositions are wrapped up in the one passage that I have quoted: 1. That Tweed robbed the city; 2. That he subsidized counsel, or, if that means the same thing as retaining counsel, that they were retained, not to defend him from the charge of robbery, not to protect him in such rights as the law professes to guarantee, but "to screen him from punishment"; 3. That he paid them out of the money of which he robbed the city; and, 4. That all this was dis-creditable to the people of New York. The fourth proposition stands or falls with the other three. Let us take these in their order.

"Tweed robbed the city." How does the Governor know that? It was the question to be tried, or rather one of the questions. Counsel were wanted for that very purpose. To sentence first, and try afterwards, is not the justice promised in America, but the justice of Rhadamanthus practiced below. Pass, then, to the next proposition, and, in doing so, cast a side-glance at the happy use of the word "subsidize," in place of those common ones, engage or retain. This, however, is a matter of taste, not of law or of morals; and if the Governor, whose manners certainly should be faultless, prefers to call a

\* John E. Burrill, John Graham, William Fullerton, Edwin W. Stoughton, William O. Bartlett, John H. Reynolds, John Ganson, George F. Comstock, Edward R. Bacon, Elihu Root, Willard Bartlett, William Edelman, Dudley Field, and the writer of this letter.

lawyer's fee a subsidy, nobody need quarrel with him for it. An over-curious person might ask how many such subsidies the Governor had paid in his lifetime.

But how is he *sure* that Tweed's counsel have received fees at all? If a fault-finder, knowing no better, were to complain that citizens of New York were using the money of the people to subsidize the highest legal talent in the State, to invent strange remedies, procure retrospective laws, and belabor the Judges, not for the sake of recovering spoil, by the readiest and quickest methods, but to break down a former enemy and rival, to gratify spite, or indulge a whim, or to advance the interests of a party or a partisan, how would he be answered? With great vehemence he would be told that the counsel in charge of the prosecution against Tweed, or some of them, serve without fees. Is it incredible that the defendant's counsel are as indifferent to money as the counsel of the plaintiffs? Is it not within the limits of at least a remote possibility that they who see, or think they see, an attempt, under cover of an excitement, to strain or pervert the law, may have volunteered in the interest of justice to defend him, as they would defend him if a mob were hurrying him to the lamp-post? It may indeed be true that his counsel are paid, or it may be true that they are not paid, but whether paid or not is none of the lecturer's business.

Supposing them paid, however, what were they paid for? "To screen him from punishment," says the Governor. That I deny. When they received their retainers, what obligation did they assume, and what did they undertake to do? They undertook to discuss for him the charge against their client, and the evidence in support of it, and to present to the Court and jury all that could lawfully be said in his behalf, in respect to the character of the charge, the extent to which it was proven, and the legal consequences following the proof. This they undertook to do, this the law required them to do, and less than this no system of law could require, without making the processes of the law solemn jests, and the professors of the law ridiculous jesters.

If the charge against Tweed was not well founded in law, it was the duty of his counsel to say so to the Courts; if the

evidence offered to sustain the charge did not sustain it, then it was equally their duty to say that, and, if the charge or any part of it was proved, and the punishment demanded by the prosecution exceeded the measure of the law, it was furthermore their duty to make that appear. Take the conviction and the sentence actually imposed in one case as they appeared upon the record. He was sentenced to twelve years' imprisonment, when the law allowed only an imprisonment of one year. Was it, or was it not, the duty of counsel to procure his release from the excessive sentence of eleven years? Is it possible that any man of sense can harbor a doubt upon this question? If now and then an ignorant editor has or expresses a doubt, the Governor has studied law and read history, and he knows better. He can not mean that it was right to keep Tweed eleven years in jail, contrary to law; for that would suppose him weak and cruel. If he does not mean that, he can not mean that it was wrong to get Tweed out of an unjust imprisonment. What, then, does he mean, what *can* he mean, when he speaks of screening from punishment?

What, indeed, can be the Governor's theory of forensic morals? What, in his view, is a lawyer to do, whom an accused person seeks to retain for his defense? Is he himself first to try the defendant; or if, not that, and he accepts the retainer, is he to assert *all* his client's rights or only some of them—and if some only, which? Is he expected to be, or should he be, wiser or better than the law itself? The truth is, that there can be conceived no consistent theory of a government of law, which does not include an independent bar, pledged to the assistance of every man who requires it for the maintenance of all the rights which the law promises him. The lawyer is neither lawgiver nor judge. If the law is wrong, let the former change it; if the judgment is wrong, let it be reviewed on appeal; or at the very least let the Judge hear all that can be said on either side of the case before deciding it.

The Governor does not complain of any malpractice by Tweed's lawyers. He complains of their appearing for him at all. If they had suppressed testimony, fabricated evidence, misquoted law, or otherwise misled the Judge, then he would have had something to complain of.

The defense of Tweed has been conducted as fairly as ever defense was conducted in the world. There is no occasion to go into particulars, but I defy any fault-finder or calumniator to put his finger on a single act which the severest critic could justly censure. The delays that have occurred, and the miscarriages that have happened, are all traceable to the mistakes or the mischances of the prosecution.

The third proposition, namely, that Tweed paid his counsel out of the money of which he robbed the city, is as groundless as the second. Assuming, for the sake of the argument, that he robbed the city and that he paid counsel, how does it follow that what went to the one came from the other? There is no pretense that the identical money paid is traceable to the city. The charge is, that certain contractors obtained payment of bills that were not due, or greater than were due; that one quarter, or less than one quarter, of the amount went into Tweed's bank account, and that he drew out the money from time to time, but what he did with it no man has yet attempted to show. By what series of transmutations these sums of money, or rather these shifting credits, which have not been traced, are nevertheless followed, or supposed to be followed, into the hands of Tweed's counsel, it would trouble the most adroit conjurer to point out. If Tweed had never in his life been possessed of a dollar beyond what he drew from these credits six years ago, and the increase of the same, all that could with certainty be said of the means, which on any given day since he had for the payment of counsel, would be that they were the fruits of speculations and business, carried on with capital dishonestly obtained.

But it has never been pretended that he was destitute of other means. If we may credit common report, he was rich before the peculations began, and while they were going on he paid out a million or so to corrupt the Legislature. What, then, is meant? Is it that because a portion of a man's estate has been dishonestly gotten, therefore, nobody should receive a payment from him? Let us see how that would work. If a lawyer can not receive money from him, nobody else can. He could not pay his doctor. He could not disburse money for board or lodging, or buy a railway-ticket, or hire a house, or

send his children to school, if he had to pay for it. Assuming that a portion of his property was honestly and a portion dishonestly acquired, the theory of the Governor must be, that he could not properly use any portion of this property to protect his right to the honest portion of it—a theory so preposterous as to carry its own refutation.

If the theory were once accepted, the presumption of innocence would stand reversed, and a suspected person would have to prove himself guiltless before he could be defended. The fool who protested that he would not venture into the water until he had learned to swim, was a wise man compared with the believers in this theory. If the men of this world were omniscient—the lawyer and the client, the giver and the receiver, the officer and the citizen, the Governor, the Legislature, and the Judge—then might their eyes at a glance detect the stain upon the money which unclean hands offered; but in that blissful state there would be no occasion for the relation of lawyer and client, because judgment would be intuitive and unerring. But how is it now? James Jackson, we will suppose, owns a newspaper, and was engaged, once upon a time, in questionable enterprises: bought up city markets; procured the votes of common councils and legislatures; won lawsuits, and grew rich. Is the newspaper which he bought with the fruits of these operations clean or unclean? John Jones was a public officer, employed to make contracts for the Government; he received commissions from contractors; was indicted and tried. Were the fees with which he retained counsel—I beg pardon, subsidized them—paid out of stolen money? John Doe has just failed, with fifty thousand dollars in bank; other assets of half a million, and debts of two millions; his creditors call him a thief, and charge him with purchasing when he knew he could not pay, and they pursue him with arrests and attachments. May he rightfully draw out a fifth part of his bank balance to retain counsel for his defense? Richard Roe is a large importer from abroad, and a large purchaser at home; he is, by nine tenths of his acquaintances, supposed to present exceptionally low invoices at the custom-house, and to purchase by auction goods which must have been smuggled: can a Christian man with a

clear conscience, let to him a storehouse, or receive wages at his hands, or take his alms in church, to say nothing of a counsel fee, if he happens to be indicted for participation in smuggling ? Where is the separating and purifying process to begin, and where is it to end ? All they who handle unclean money, all presidents of bankrupt corporations who have taken unconscionable salaries, all makers of adulterated wines, dealers in adulterated food, venders of adulterated milk, all who put false labels on their goods or publish lying advertisements to deceive the unwary, all despoilers of foreign authors by pirating their books, all dishonest dealers whoever they may be—these are not only bad citizens, who deserve punishment for their misdeeds, but they are incapable of making a valid transfer or paying for any service, or satisfying any want, that requires the expenditure of money.

The charge against Tweed was in some respects like that against one who, some years ago, was charged by eight indictments with having received as a public officer large sums of money belonging to the United States, to be paid to certain persons for supplies, and obtaining from those persons receipts for such sums, but paying them less, pocketing the difference. He appeared by counsel, who no doubt were paid ; but it seems not to have occurred to any one at that time to inquire where the money paid them came from. Not a lamentation was heard that the money of the Government was used to subsidize legal talent in order to screen somebody from punishment. Observe what progress we have made in ten years. And at the rate we are going, it will be impossible, at the end of the next decade, for any man, whose obscurity does not shield him from all observation, to have any dealings with anybody, because by that time every such person will be charged by somebody with something wrong, be it true or false.

Our worthy friend the ex-Governor has not himself wholly escaped the flood of calumny that is beginning to engulf all professions and all characters, public and private. \* \* \* That was another reason why he should not himself fall into the same error of condemning without hearing. There are occurrences which do not require investigation, and need no explanation, but which, held up before the Governor, might remind him

of the value of caution, if not of charity. He did not half exhaust his subject. He might, for instance, have spoken of the lack of independence in candidates for office. He might have gone back to the time when he was candidate for reëlection to the office of Governor, and found himself in Cooper Institute addressing the electors, and, as it were, asking them for votes. The country then was profoundly agitated at the prospect of what seemed imminent, a President seeking election for a third term. Governor Dix's speech was, as his speeches always are, well composed and well spoken; but one topic was somehow omitted. It seemed to the audience to have been forgotten, and, as he was leaving the stage, he was called back and reminded of the omission. He returned, and what did he say? Instead of telling them how he would act himself, and how he advised them to act, he contented himself with giving this opinion:

"I am asked, fellow-citizens, my opinion as to the third term. Although I have regarded the discussion of this question as premature, I have not hesitated to give a direct answer to any question which has been personally addressed to me. I gave my opinion, when asked in this way, weeks ago, months ago. I have not been willing to thrust myself forward in this canvass, with any declaration of my views frankly, because I know very well that, if I did not answer it directly, a misconstruction would be put upon my silence. I say then, distinctly, that I am not in favor of a third term. Forty years ago, fellow-citizens, in one of the first speeches I ever made in public, I proposed an amendment to the Constitution of the United States, extending the Presidential term to six years, and making the President ineligible for the next six. I have repeated this proposition over and over again, in resolutions and addresses at public meetings, and, until such an amendment to the Constitution can be made, I am, as I have always been, in favor of adhering to the rule which had its origin in the patriotic breast of Washington, which has been held sacred by his successors for more than three quarters of a century, and which has acquired in practice a force almost as potential as if it had been ingrafted on the constitutional compact. It has sunk deep into the hearts of the people, and I believe any disposition to violate it would be received with marked disfavor. I do not believe that such a purpose exists anywhere. Washington and Jackson, who were rewarded by their country by the highest distinction in its power to give, voluntarily retired from office after having a second time received the highest mark of the confidence and gratitude of their countrymen. General Grant has been rewarded for his great services to the country by the same high distinction, and I do not doubt,



fellow-citizens, that when he deems the proper time has arrived, he will express his desire to be relieved from the cares of office, and give, by his action, additional force to the example of his illustrious predecessors."

Why not say what the people wished to hear, that he was not only opposed to a nomination for a third term, but would vote against the candidate nominated for it, though he were recommended by a hundred conventions? This would have been the kind of language for a statesman, a courageous politician, a leader of the people.

I must not forget another omission, from the January lecture. The preceding summer had been memorable for an attack upon the highest Court of this State, an attack, the like of which had not been seen for malignity and falsehood. The Governor could hardly have forgotten it, for it was recent, and it related to Tweed. Why speak of the demoralization of the times, and omit all mention of that? Are we to infer that he approved it, or that he was afraid to speak his mind concerning it? Whichever it be, let us tell him that, if its success had equaled its purpose, no one act would have done more to undermine the faith of the people in their judicial officers and institutions. Nothing has ever happened in the politics of our State more wicked, and nothing but its impotence saved it from becoming a most alarming evil. Why strain at a gnat and swallow a camel?

But I have said enough to show how grievously the Governor misunderstood his subject, his audience, and himself. Perhaps I have taken his words too seriously, and given them more significance than he intended. But even, if they were spoken hap-hazard, the easy talk of an idle moment, they may be taken in earnest by unsuspecting persons, and should not go unanswered and unrepelled.

There is one part of the lecture which goes part way to redeem the faults of the rest; the concluding portion, in which we are told, in words touching and eloquent, how little, after all, the current of human life has changed in the lapse of ages. The same hopes and fears, the same passions, the same struggles for place and wealth agitated the breasts of those who dwelt on the banks of the Nile and the Tiber, when they were the seats of civilization and power, as move the hearts of men, now that

those seats have been transferred to the banks of other rivers, and into the keeping of other races. If we compare only the best specimens of men in the ancient with the best of modern days, we shall find little reason to boast of the superiority of to-day over two thousand years ago. The progress of the race is not, however, thus to be measured. It is traced in the elevation of the many to a nearer equality and closer communion with the few, in more nearly supplying to all men opportunity and means of satisfying their physical and intellectual wants, and, above all, in providing for every human being a guarantee of human rights. Here we come again to the topic with which we began, the profession of the law and its duties. Upon the theory of the Governor, this profession would be worth nothing as a defense against unlawful, if it were only popular, aggression. Whoever deliberately attempts to make this theory prevail, does his best to turn back the stream of civilization.

No, dear Governor, do not lend the sanction of your name to the inexcusable folly of attempting to frighten lawyers from the performance of their duty, knowing that, when the strain comes, they will be needed more than other men for the maintenance of the rights of all. Teach them, rather, that when they see a man set upon by the whole community, then is the time for lawyers to stand up against the surging crowd, and say that he shall have a fair trial according to the law. Show them that their great office is to vindicate and help execute the laws, fearing no man or number of men, so long as they see their duties written in the laws themselves, and follow them.

Most justly, is it said in this lecture, that the nature of man has suffered no change. Those who were sycophants and cowards before kings in past days, would have been sycophants and cowards before the people in ours; they who feared to defend one whom the crown hated, would be afraid now to defend one whom the multitude pursued; it is only the object of the flattery or the fear that has changed. Then it was the power above them, now it is the power around them, but power in both cases all the same. The men who to-day would howl after lawyers for defending unpopular persons, would have hooted

at Bunyan and clamored for the blood of Raleigh ; they would have applauded Jeffreys, clapped their hands at the sight of Scroggs, and cheered the hangman of Riego. Out upon such cowardly baseness ! The ignoble crew live in all ages ; their hearts are the same : it is only in their opportunities that they differ from age to age.

*June 1, 1876.*

## THE FIELD PARKS IN HADDAM, CONNECTICUT.

### PRESENTATION ADDRESS.\*

LADIES AND GENTLEMEN: You know that we are here to deliver into your hands the parcel of ground on which we are standing, and that other which lies in view before us, to be kept as pleasure-grounds for the people of Haddam in all time to come. We give them in memory of our father and mother, who were married seventy-five years ago to-day, and came immediately afterward to make their abode on this river-side, where he was soon to become the pastor of the church and congregation. Here they lived active and useful lives, in the fear of God and love of man, doing faithfully their several duties, he in public ministrations from pulpit and altar, at bridal, baptism, and burial, and she in the quiet tasks of her well-ordered

\* The following circular explains the occasion of the address:

HADDAM, CONNECTICUT, October 24, 1878.

DEAR SIR: Messrs. David Dudley Field, Stephen J. Field, Cyrus W. Field, and Henry M. Field, surviving sons of Rev. David D. Field, D. D., having purchased and laid out two plots of ground in the center village of Haddam, will on the 31st inst., at two o'clock, make a formal presentation of the same in trust to the town as a public park, and as a MEMORIAL of their parents, who spent a considerable portion of their lives here. The undersigned, representing the town in this regard, beg most cordially to invite you to be present at the center village of Haddam, when such presentation is made, and there to meet the Messrs. Field. It is believed that this is the first instance in which a gift with such an object has been made, and it is thought that some public notice should be taken of it; the gift to the town is generous, and it is reasonable to hope that others may be led to imitate an example so worthy, and so timely, in view of the growing interest in rural adornment throughout our State. Respectfully yours,

MINER C. HAZEN, A. H. HAYDEN, GEORGE W. ARNOLD, CYRUS A. HUBBARD, O. F. PARKER,	}	<i>Committee of Arrangements.</i>
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household. Though now, after more than fifty years of wedded life, they sleep side by side in the pleasant valley beyond the Connecticut hills, where their last days passed serenely away, they were faithful until death to the love of their early home. Natural indeed it was, for here they passed their first years together; here they raised their first domestic altar, and here most of their children were born. For this cause, and in grateful remembrance of their love and sacrifices for us, we, their surviving children, four of us only out of ten, present these memorials, not of cold stone, though the hills about us teem with everlasting granite, but of pleasant walks, green lawns, and spreading trees, where this people may find pleasure and refreshment, generation after generation, so long as these fertile meadows, these rugged hills, and this winding river shall endure. And remembering that "beauty is truth, truth beauty," we hope that they will cultivate here that love of nature which is a joy in youth and a solace in age; which nourishes the affections, and refines while it exalts; which rejoices in the seasons and the months as they pass, with their varying beauties; catches the gladness of June and the radiance of the October woods; and in every waking moment, sees, hears, or feels, something of the world around to take pleasure in and be grateful for. We trust that they will come, not in this year only or this century, but in future years and centuries, the fair young girl, the matron in the glory of womanhood, the boy and the man, grandson and grandsire, in whatever condition or circumstance, poverty or riches, joy or sorrow, to find here a new joy or a respite from sorrow; to drink in the light of sun and moon, listen to the music of birds and winds, feel the fresh breath of life-sustaining air, thank God and take courage.

Reverently then we dedicate these memorials of our parents, to the enjoyment forever hereafter of those, and the descendants of those, whom they loved, and among whom they dwelt.

## ADDRESS AT THE DE LESSEPS BANQUET,

GIVEN AT DELMONICO'S, MARCH 1, 1880, IN RESPONSE TO THE  
TOAST, "INTERNATIONAL LAW; ITS FOUNDATION IS THE  
BROTHERHOOD OF MAN, ITS COMPLETION WILL BE PEACE  
AND GOOD-WILL."

WHEN one reflects that international law is the body of rules to govern the intercourse of nations, he perceives that it is as important and extensive as the intercourse itself. The ship of war that sails from this harbor to carry its country's flag to the ends of the earth; the great steamer that goes out laden with travelers; the whaler that is to seek its game in Arctic and Antarctic seas; the little fishing-craft that rocks and works on foggy banks and in fields of ice—all these are equally covered by its protecting wing.

It is the growth, not of one century, but of many centuries. Slowly have the nations yielded to its influence. Two opposite policies prevailed—the policy of isolation and the policy of intercourse. China and Japan present the latest instances of the former; our country, at least until lately, was the most significant example of the latter.

We, first of the nations, opened the gates of Japan. We demanded intercourse of the rest of the world as a right, we desired it as a benefit. It was a right, because man is a social being, and his happiness is promoted by fellowship with his race, and because the products of the earth are the inheritance of all the children of men.

The aims of international law are peace and justice, and these are promoted by intercourse with our fellows. It is with nations as with individuals. We view with indifference or distrust those we do not know; when we know them, we find that every human heart is human; we see good where we had

expected evil, and we discover to our surprise that men are everywhere ready to interchange benefits.

The instinct of justice teaches us that nations are equal in rights, as the individuals who compose them are by nature equal. Before the law of nations the smallest and the weakest state stands the equal of the largest and strongest. A bully among nations is as wicked and detestable as a bully among men.

To multiply the facilities of intercourse is to multiply the agencies of peace. Whoever opens a new highway, by land or sea, is a benefactor of men; and if he places it under the protection of the nations by an international act, he gains a victory no less glorious than the greatest achievement of arms.

Our own country was the first to move in that direction. A great European publicist, Sir Travers Twiss, in a paper read two years ago before the Association for the Reform and Codification of the Law of Nations, said:

"The New World has in this matter taken the lead of the Old World, and the Treaty of Washington of the 19th of April, 1850, has consecrated a principle applicable to all such enterprises in which the commerce of the world is interested. This principle is, that those great industrial works shall be exempt from all injury consequent upon disputes between particular nations, when they appeal to the arbitrament of the sword for the settlement of such disputes."

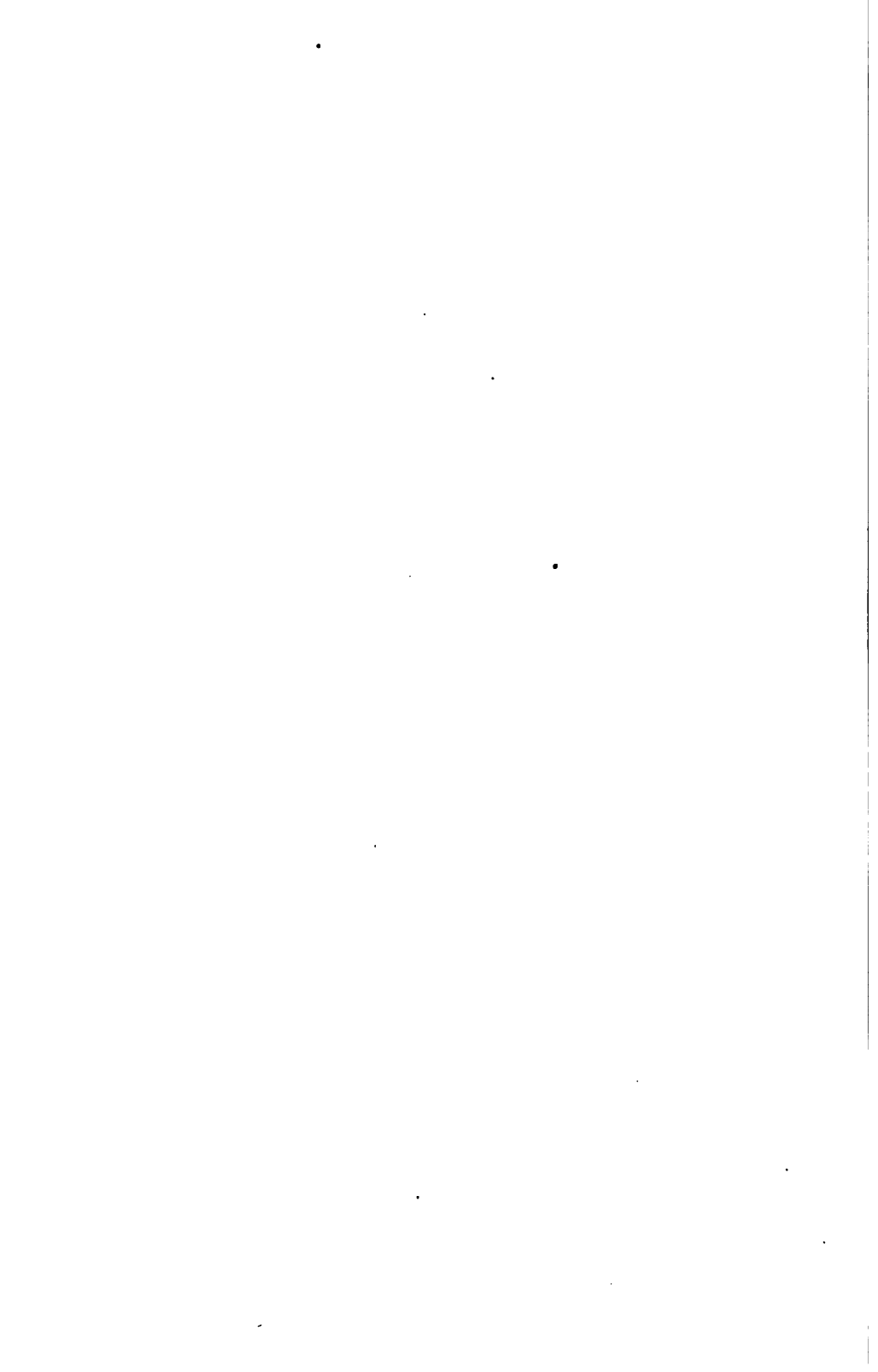
The treaty thus mentioned is known as the Clayton-Bulwer Convention, made between the United States and Great Britain, in respect to the construction of a canal across the Isthmus of Nicaragua, and declared that the two governments were determined to give their support and encouragement to such persons or company as might first offer to commence the same with the necessary capital, the consent of the local authorities, and on such principles as accord with the spirit and intention of this convention; declaring also that "neither the one nor the other will ever maintain for itself any exclusive control over the said ship-canal"; that "vessels of the United States or Great Britain traversing the said canal shall, in case of war between the contracting parties, be exempted from blockade, detention, or capture, by either of the belligerents; and this provision shall

extend to such a distance from the two ends of the said canal as may hereafter be found expedient to establish"; that "they will guarantee the neutrality thereof, so that the said canal may forever be open and free"; that they will "invite every state with which both or either have friendly intercourse to enter into stipulations with them similar to those which they have entered into with each other"; and that "having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection by treaty stipulations to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama."

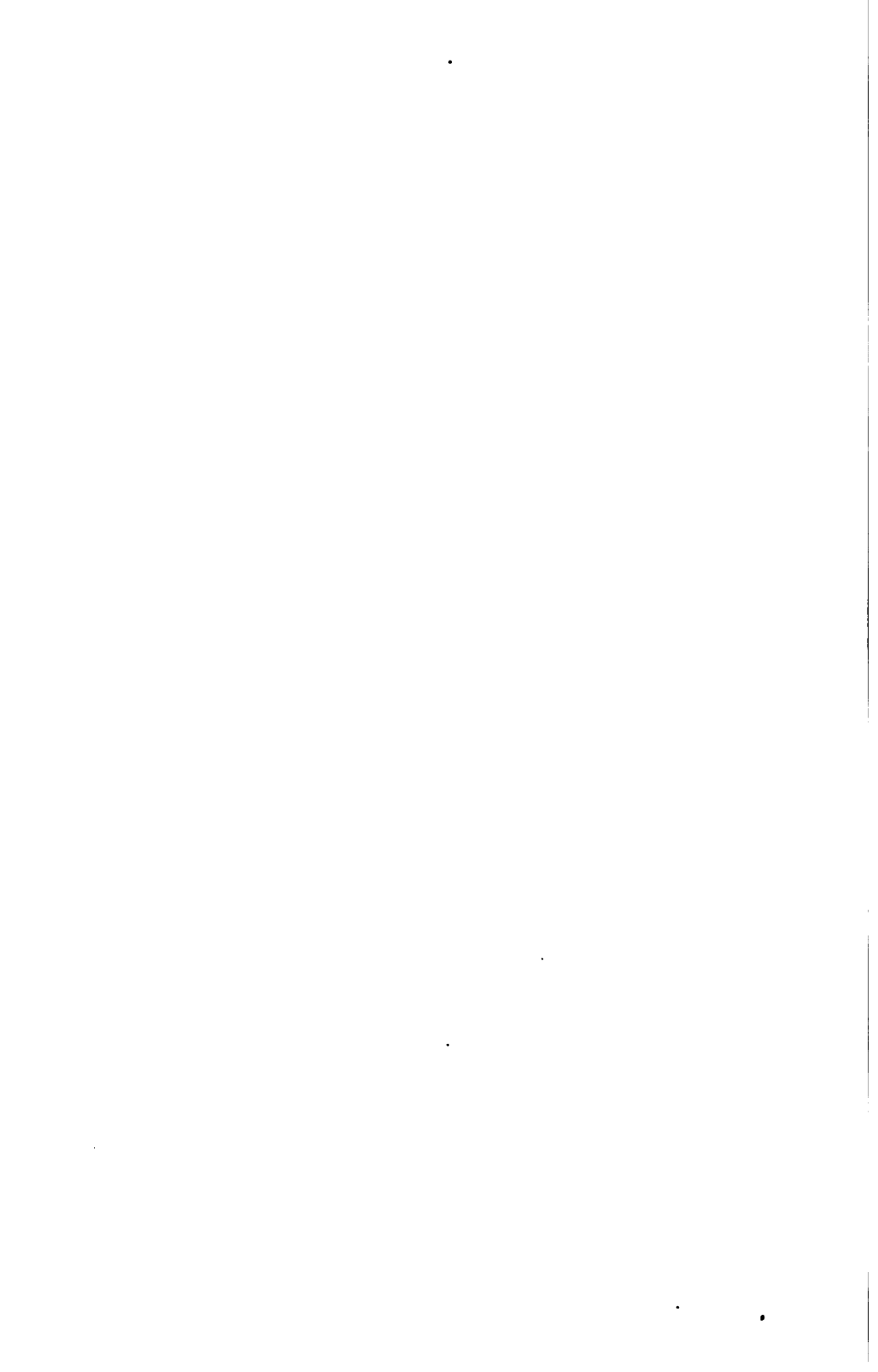
Though this convention of thirty years ago has borne no other fruit, it has consecrated a principle which should stand forever hereafter firmly imbedded in the law of nations. Under its sanction let a great water-way be opened from ocean to ocean; let it marry the waters of Europe to the waters of Asia; let it bring manifold increase to the commerce and comforts of men, not for this age only, but for all coming ages; let the flags of the nations salute each other as they pass and repass; but let the blood of man never redden its stream or the waves of its inflowing seas! So let us add another to the agencies of civilization, and take one more stride toward "the good time coming."

And if the illustrious Frenchman, whose genius and indomitable will have opened the gates of the East through the sands of Egypt, shall yet open the gates of the West through the Cordilleras of Darien, he will earn a new title, greater even than the old, to the admiration and the gratitude of the generations to come.





## APPENDIX.



## APPENDIX.

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### RIVER AND HARBOR IMPROVEMENTS BY THE FEDERAL GOVERNMENT.

SPEECH AT THE RIVER AND HARBOR CONVENTION IN CHICAGO,  
JULY 6, 1846.

The convention met on the 5th of July, and was occupied the first day chiefly in arranging the order of business. During the forenoon of the second day, while the convention was waiting for the report of the Committee on Resolutions, several speakers were called up, and among others Mr. Stewart, of Pennsylvania, who addressed the convention, and in the course of his speech claimed for the Federal Government the most extended power over internal improvements. When he sat down, Mr. Field was called to the stand, and said:

THIS call, gentlemen, is entirely unexpected. I had not intended to speak, except in the ordinary course of debate, upon resolutions before the convention; but now that I am on the stand, inasmuch as I think that the doctrines of the gentleman from Pennsylvania ought not to pass unchallenged, I shall take this occasion, notwithstanding the apparent favor with which they have been received, to express my dissent, and to give my reasons against them.

In common with many others of similar opinions, I came here in earnest to promote, as far as I might be able, the avowed and legitimate objects of this convention. We are ready to do so yet, but we can not assent to the constitutional doctrines of that gentleman, nor acquiesce in the policy which he advocates. Indeed, I think I may venture to predict that if his views are adopted by the convention, the questions which should command its attention will be merged in party issues.

For my own part, I am prepared to affirm at the outset that

the Federal Government has the same power over commerce among the States, and over all its incidents, that it has over foreign commerce ; and, in that respect, that our inland lakes and rivers are included in the same category with our sea-coast. Whatever right the Government has to improve the rivers and harbors of the Atlantic, it has the same to improve those of the Northwest. It may build a breakwater in Lake Michigan as rightfully as in Delaware Bay. But there I stop, and deny altogether the power of the Government to engage in any general scheme of internal improvements—to dig canals, build railways, or open new avenues for commerce.

Let me explain what I conceive to be the true construction of the Constitution on this subject. In doing so, I purposely omit all reference to the power of Congress to construct ports and open avenues as a means of carrying on war. Acts may be constitutional and justifiable as war measures, which would be neither, considered as measures of peace or commerce. I omit equally all reference to the power of the Government as proprietor of the public lands. As owner of the soil, and sovereign of the Territories, it may do what it can not do as the Government of the States. What I have to say shall be confined to the power it may exert within the jurisdiction of the States, and in the exercise of its ordinary constitutional functions.

There are two provisions of the Constitution, under which is claimed the power to improve rivers and harbors ; the first subdivision of the eighth section of the first article, in these words : "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States ; but all duties, imposts, and excises shall be uniform throughout the United States," and the third subdivision of the same section : "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Whatever power there may be over the subject, I believe is to be found, not as many seem to think, in the former of these provisions, but as an incident to the latter, pursuant to the supplementary provision, contained in the eighteenth subdivision, which is in these words : "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers, vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The first provision has been, as we all know, the subject of a great deal of controversy. It was once insisted by the advocates of a large construction, that the words, "to pay the debts and provide for the common defense and general welfare of the United States," were themselves a substantive grant of power; but that ground has been abandoned, and it is now admitted that they are not a grant, but a limitation of the power conferred by the previous words in the same sentence. How strict, then, is this limitation? What does it signify? Does it mean that Congress may raise and apply money to any purpose which may conduce to the general welfare, or, what in practice is the same thing, which it may vote to be for the general welfare, or does it mean that Congress may raise and apply money to any of the designated objects of the Constitution? We insist that the latter is its true meaning.

The reasons for it are these: While the language of the sentence is susceptible of either interpretation, the design and character of the whole instrument favor one and reject the other. The language, I admit, is susceptible of either interpretation. In the one case the words, "*as herein declared*," are understood; in the other, "*according to the discretion of Congress*." I read the whole sentence as if it were written thus: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, *in order to pay the debts of the United States already contracted, or for the purposes herein declared hereafter to be contracted*, and to provide for the common defense and general welfare of the United States, *as herein declared*, but all duties, imposts, and excises shall be uniform throughout the United States." If the qualification thus given is not understood in the former part of the sentence, then the general expression, "to pay the debts of the United States," more especially when taken in connection with the subsequent power, "to borrow money on the credit of the United States," would amount to a power to contract a debt for any purpose whatever. But notwithstanding the generality of these expressions, I suppose the qualification is understood, that the debts which the Government may contract are debts for the purpose of executing its specified powers. In the same way, I suppose, a qualification is understood to the rest of the sentence, and that the general welfare which the Government may provide for is also in the execution of the specified powers.

If the language of the sentence leave the interpretation un-

decided, very different is the scope of the whole instrument. The design and character of this at once decide it. In the first place, the whole design of the Constitution was to create a Federal Government for certain purposes, and to give it a revenue adequate to those purposes. The ends to be promoted by the Government were few. The taxing power was given as a means to those ends. No one thought of creating a Government for the purpose of taxing, but for other purposes, to accomplish which taxation was necessary. The means, then, would be naturally, and in the intention of the framers, necessarily proportioned to the ends, coextensive with them, not proceeding beyond them. There could be no motive for giving a revenue power broader than the objects for which the Government was instituted. It could not, therefore, be the *design* of the Constitution to give the Government revenues for other purposes than those for which it had created it.

In the second place, in its *character*, this is a Government of limited and strictly defined powers. Such was the intention of the framers of the Constitution ; such was the understanding of the people who adopted it. And to guard against all possibility of misunderstanding on that head, one of the first amendments made was this : "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Now, any other meaning than that which I have given, makes this Government, practically, undefined and unlimited. That power which can raise and appropriate money to any purposes whatever, which it may choose to think will promote the general welfare, has no check and no bounds but its own discretion. It can take at will from the minority of the States, for the benefit of the rest, and it can control by its expenditures those which it does not oppress by its burdens. Almost every purpose of any government can be accomplished by money. Give that without stint and without control, and what need would there be of more ? The careful enumeration of other powers was a mere ceremony. Therefore the argument for such a construction of the power in question is inadmissible, since it proves too much.

Let us come now to the second of these provisions, that relating to commerce. Congress has power to "regulate commerce with foreign nations, and among the several States." Recollect the power is given to *regulate*, not to *create*. There is a wide

difference between the two. What is the meaning of the expression "regulate commerce"? To regulate is to make rules for—to adjust by rule. We have the definition of this very power given by our greatest judge, in language as concise and comprehensive as it is possible to express, upon an occasion of unusual importance and deliberation, when, in delivering the judgment of the Supreme Court, he said of it: "It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed." This is quite a different thing from making or improving harbors or avenues for commerce! To begin or to open channels of trade is one thing; to regulate that trade another. It is the latter, not the former, which is submitted to the control of Congress. If confirmation of this view were needed, it might be found in the fifth subdivision of the ninth section, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." Is it not thus manifest that the regulations of commerce intended by the Constitution are impartial, and, so far as possible, general laws? Could it have entered the minds of the framers of the Constitution that, notwithstanding their precautions, Congress was still at liberty to prefer one port to another, by digging a harbor here and omitting it there, lavishing its wealth on the river of this State, and leaving that of another to flow on in the channel which Nature gave it?

Where, then, it will be asked, is the power to set up light-houses and beacons? The doing so is no more a regulation of commerce than it is a regulation of the finances. How does Congress get the power? It is because light-houses and beacons are indispensable to the execution of the regulations of commerce. This is the source of the power, and the whole of it.

I have already repeated the provision respecting incidental powers. Congress may make all laws "necessary and proper for carrying into execution" any of the powers of the Government. Whatever measure, therefore, is "necessary and proper for carrying into execution" the regulation of commerce is confided to the power of Congress, and for the same reason everything that is not "necessary and proper" is beyond its power.

What measures, then, are "necessary and proper" to carry into effect the regulation of commerce—that is, to carry into effect the rules which Congress has prescribed for the government of commerce? Surely, nothing more than those without which the



regulations would fail of their proper effect. If the regulations would become inoperative wholly or partly, but for certain other measures incidental to them, then those other measures are within the competency of Congress ; if not, not. In other words, it appears to me that the whole duty and the whole right of Congress may be expressed in the word *protection*. Congress must protect the commerce which it regulates, because protection is indispensable to the effect of the regulations. And this protection may reach any impediments supervening to destroy or obstruct the commerce which is regulated.

Hence I maintain that Congress may erect light-houses and beacons to guide the mariner and warn him of danger, that it may build piers or breakwaters for shelter on dangerous coasts, and that it may remove obstructions on navigable streams, whether placed there by man or washed down by the waters. All these it may do, because they are "necessary and proper" to carry into execution the regulation of the commerce itself.

Conformable to this view has been the practice of the Government almost from its institution. At the first session of the First Congress an act was passed directing the expense of keeping up the light-houses, beacons, buoys, and public piers then existing in any bay, inlet, harbor, or port of the United States, to be defrayed out of the Treasury of the United States, and making it the duty of the Secretary of the Treasury to provide, by contract, for rebuilding them, keeping them in good repair, and furnishing them with supplies. This practice has never been interrupted or disputed by any Congress or any administration.

The incident is, of course, no broader than the principle. The commerce which Congress is to regulate is foreign commerce and commerce among the States, not the internal commerce of a State ; therefore, those waters which bear only such internal commerce are not subject to supervision or improvement by Congress. Take, for example, the lakes lying wholly within the State of New York, as Cayuga or Seneca. There is some commerce carried on between their shores ; and yet, I apprehend, Congress has nothing to do with it, nor with the convenience or safety of the navigation.

Thus it appears to me that, from the natural and fair import of the language of the Constitution, from the uniform practice under it, and from the reason of the thing itself, we have this rule, plain and indisputable, that on all navigable waters, where

is carried on a commerce with foreign nations, or among the several States, Congress may, as an incident to its direct power over the commerce, afford it also protection, by the establishment of light-houses, beacons, and piers, and by keeping open and free the natural channel through which it flows. So far, I think, we occupy, all or nearly all of us, common ground.

Can we go further? Can the Government open new avenues for commerce? Can it enter upon the soil of the States and dig canals, build railways, and scoop harbors out of the unindented coast for new marts of trade? For one I deny that it has any such power. I deny that it can go one step beyond the rule I have given. The reason is obvious, and to my mind unanswerable, that the creation of the canals, railways, or harbors can not be "necessary and proper" to carry into execution a mere regulation of commerce. I say it can not be so; for I can not conceive of any law, made in good faith as a regulation of commerce, which requires this creative process. If there be any such, I beg it may be pointed out.

Men of lively imaginations may discern relations where more sober persons can see none. They may perceive, or think they perceive, the necessity of a particular measure to the execution of a regulation of commerce, while practical men can perceive in it no necessity or propriety whatever. Now, I apprehend we are to interpret and to execute the Constitution as practical men. We are not to pronounce a measure necessary, as incidental to another, unless that necessity is reasonably evident. Any other practice would enlarge the Constitution into an instrument of all-comprehensive power, and subvert the authority of the States.

It is in dealing with the incidental powers that we perceive the difference between one who construes the Constitution strictly and another who construes it loosely. The former requires the necessity of the incidental measure to the execution of the principal to be made manifest before he feels it safe to adopt it; the latter is satisfied with almost any relation between the two; if the one is affected even remotely by the other, it is enough. The latter sometimes substitutes the incident for the principal, or adopts the principal for the sake of the incident; the former looks at the principal for its own sake alone, and refers to that which is incidental merely as an indispensable means of executing the other. So, in respect to this question of regulating commerce, some persons may possibly think it constitutional for the Government to

become itself a purchaser of products, for the purpose of affecting commercial exchanges. There is no doubt that by large purchases of grain it might now affect prices and control the markets, influencing in the greatest degree the commerce of our merchants. But will any one here assert that the Federal Government, if it were never so much inclined, has constitutional power to make such purchases, or to engage in any way in trade, as incidental to the regulation of commerce? This is an extreme case; but it will serve the purpose of illustration.

Let us look a little at the consequence of so enlarging the incidental powers of Congress, as to allow the right to open new avenues of commerce through the territories of the States. In our desire for the accomplishment of a useful object, we are apt to overlook the consequences of calling in a foreign agency to effect it. Let us not forget that the States are nearest to the people, and the fittest depositories of power for all the purposes to which they are competent. Let us consider, moreover, that whatever power Congress may have over the subject is paramount to that of the States, and theirs must give way for it. If Congress may dig a canal around the Falls of the Ohio, it may do so against the will and despite the force of either Indiana or Kentucky. It must then be able to exercise jurisdiction over it, to the exclusion of the State, for the purpose of controlling its navigation, keeping it in repair, and exacting tolls. If it can make this canal of three miles, it can make another of thirty around the Falls of Niagara. Nay, more, it could make one of three hundred miles, from Lake Erie to the Hudson; and, if it could have made the Erie Canal, it can now take it from the State of New York, paying, of course, its value, with the view of enlarging its dimensions, so as to make them commensurate with the swelling tide of Western commerce, in its utmost amplitude, for many generations. However extravagant this may seem, the power to do it is necessarily asserted by those who maintain the power of the Government to make a canal for the purpose of facilitating commerce. What would New York say if it were attempted to take her great work from her hands? How would she bear the introduction of Federal officers along its line? Would she content herself with remonstrance against the injustice and the impolicy of the proceeding? Or would she not rather deny its legality, and treat it as a bald usurpation?

It is impossible to believe that the clear-sighted men who

framed the Constitution of the Union, who, solicitous themselves to preserve the just balance of Federal and State authority, were watched by others, jealous partisans of the States, still more solicitous for their authority—it is, I say, impossible to believe that these men should have contemplated the giving of so vast and undefined an authority to the Federal Government, under cover of an incident to the regulation of commerce. The Constitution had its origin chiefly in the want of uniform commercial regulations for all the States. The conflicting rules of the different States made necessary a more perfect union. Till then the regulations of commerce, the marts of commerce, the avenues of commerce, all navigable waters, ports, and harbors, remained under the undisputed control of the States, notwithstanding the Confederation. Is it conceivable that, of all these subjects, the makers of the Constitution should have expressed but one, while they intended all? Is it not rather most probable, nay, certain, that they expressed what they intended, and therefore that they intended the making of new avenues of commerce within the States to remain, as before, under the exclusive control of the States themselves?

Should Congress be deemed vested with the power to improve rivers dividing two or more States, because the States are prohibited from making, without the consent of Congress, an agreement to improve them? That argument may apply to the Mississippi. But arguments, from inconvenience, are at best weak and unsafe on constitutional questions. The provision for amendment was made for that case. The inconvenience, however, is nothing more than that of getting the States most concerned in the improvement to agree upon making it. Congress will consent, of course, as readily as it will make the improvement. But were the inconvenience ten times greater, what would it prove? Two States can not agree upon the boundary between them, without the consent of Congress. Does that prove that Congress may establish the boundary?

Holding these opinions upon the constitutional question, touching internal improvements by authority of the General Government, I have expressed them without reserve; for though I would not willingly have obtruded them upon you, perceiving that they are not such as are held by a majority of this convention, yet, having been called upon, I can do no less than speak what I think. But I believe, moreover, that these opinions are

such as are held by a majority of our countrymen, notwithstanding the disfavor with which they are received here.

We believe that a strict construction of the Constitution is not more a true rule of interpretation than a great rule of policy. Every power given to the Union is so much taken from the States and from the people. When the convention assembled in Philadelphia, with the Father of his Country at the head, to bind the States together by a Constitution at once limited and supreme, it set down in clear and precise terms the powers which it proposed to confer upon the national Government. With these in their view, the people adopted the Constitution. They did not agree to enormous powers, latent behind these or wrapped up in them as incidents, to be brought out by construction and used at the discretion of Congress.

The tendency of power is ever toward accumulation and extension. Give it scope for construction, and let it construe for itself, it will carry on the process of absorption till it obtains all that it covets. Is not such a government practically one without limitation, since its powers are bounded only by its desires? Its advances are gradual, and under the sign of beneficence. When it approaches internal improvements, the first step will be the execution of a useful work, at the request or with the consent of the States concerned. The act of to-day becomes the precedent of to-morrow, and the next day begins an undertaking against the will of the State where it is begun, at the instance and for the benefit of others. What was a small thing at first, apparently useful, becomes at last a formidable instrument in the hands of majorities, against the use of which minorities may protest in vain.

We have been warned that the inhabitants of the Mississippi Valley are to be the future rulers of the republic; that what we do not grant they will be able to take, and will take, and we have even hints at retaliation. We know, indeed, that the Federal scepter is passing from us, who have swayed it so long in peace and in war—with what success history shall tell—to you who, counted now by millions, will soon be counted by scores of millions. But we have not the least apprehension on that account, so long as our great charter stands unimpaired. You will have the power of numbers, but the Constitution is your only warrant for its exercise; and for the maintenance of that, in its obligations and its limitations, we rely both upon your good faith

and our own spirit. This warning, however, and the fact that the power of this Union is so soon to rest here, upon these central lands, having so many interests in common among themselves, and so many opposed to the Atlantic and Pacific borders, makes us but the more solicitous to watch the interpretation of our federal compact—to construe it strictly—to leave as little as possible to inference, and to suffer no encroachment upon its provisions.

Perhaps, too, the time is coming when Western States will be as sedulous to guard against constructive power as any States, Eastern or Southern. Illinois may yet have an interest in maintaining the strictest construction, not less strong than Virginia. Possibly even now the difference of their circumstances may account in part for the difference of their judgments. An old State, rich and well peopled, finds her resources equal to her wants, and unwillingly admits interference from abroad; while a younger State, whose resources are undeveloped and whose scattered population is struggling with difficulties, seeks aid from the readiest quarter with less question and scruple. But when the young State has herself become prosperous and strong, her wants are satisfied and her feelings reversed. Lay down, therefore, now, the principles by which you will have the Constitution interpreted, and according to which you will be governed, fifty years hence, when Illinois will be more potent than some of the empires of the earth. Then you will be cautious in the division of your resources with new States, rising up beneath the over-spreading wings of our eagle—some of them, it may be, far off toward Hudson Bay, or the Southern Isthmus.

The world is watching the solution of the problem we are solving on this Western Continent—whether our governments of the people can be maintained or not. That depends upon the question whether written constitutions can be preserved inviolate. If we interpret strictly and execute fairly the fundamental compact, a federal republican government is a reality which may last; if we do not, it must perish. Could this Government last twenty years if it were consolidated? What prevents its being so, but the maintenance of all the rights of the States? Preserve them intact, and those free and independent sovereignties will stand as eternal barriers to check usurpation and repel aggression. They know little of the motives of human action, they have learned few lessons from the history of the world, who believe that a

country like this, stretching from sea to sea, through more than twenty parallels of latitude, can be governed by any power but an emperor's and his prefects, except it be by a power like ours, strictly federal, with a limited and well-defined authority, where the reserved rights of the States are firmly guarded and constitutional guarantees constantly maintained. With these rights guarded and these guarantees maintained, our States, our Union, and our freedom may last as long as the globe itself. And—

“Wide—as our own free race increase—  
Wide shall extend the elastic chain,  
And hold in everlasting peace  
State after State, a mighty train.”

# ASSOCIATION FOR THE REFORM AND CODIFICATION OF THE LAW OF NATIONS,

AND

## THE INSTITUTE OF INTERNATIONAL LAW.

A SHORT ACCOUNT OF THEIR ORIGIN. FIRST PUBLISHED IN  
FRENCH, AT PARIS, OCTOBER, 1873.

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### CONFÉRENCE INTERNATIONALE POUR LA RÉFORME ET LA CODIFICATION DU DROIT DES GENS.

Compte rendu présenté, le 25 Octobre 1873, par M. FIELD, Président du Comité d'Initiative américain.

Le samedi 25 octobre 1873, un banquet organisé par les soins du *Comité d'études pour la Réforme et la Codification des Lois internationales* réunissait, au Café de la Paix, quelques personnes s'intéressant à cette grave question. Le banquet était présidé par M. Frédéric Passy, vice-président de la Société des Amis de la Paix. En face de lui était placé M. Field, président honoraire de la Conférence qui a eu lieu à Bruxelles au mois de septembre dernier. A leurs côtés, on voyait MM. Washburne, ministre des États-Unis ; Cauchy, membre de l'Institut ; le général Read, consul-général des États-Unis ; Paul Biollay, conseiller référendaire à la cour des Comptes ; Joseph Garnier, secrétaire-perpétuel de la Société des Économistes ; Charles Fauvety, Edmond Thiaudière ; de Molinari, des *Débats* ; Henry Bellaire, secrétaire-général de la Société des Amis de la Paix ; Charles Calvo ; Macon, directeur de la Correspondance Helvétique ; Jules Clère, du *National* ; Dr. James B. Miles, de Boston, secrétaire du Comité Américain pour la Réforme du Droit des Gens, et de l'*American Peace Society* ; M. Bryan, de l'*American Register* ; Dr. Raffinesque, etc., etc.

Parmi les toasts portés, nous devons mentionner celui de M.



Frédéric Passy à l'Amérique, en la personne de ses éminents représentants, auquel M. Washburne répondit par un éloquent discours ; ceux de M. Charles Fauvety, à la Justice ; de M. Miles, à la France ; de M. Henry Bellaire, à M. Henry Richard, l'illustre secrétaire de la *Peace Society* de Londres, dont la voix retentissante, en gagnant au Parlement Anglais la cause de l'Arbitrage, a vibré dans le monde entier ; et enfin le toast de M. Edmond Thiaudière à la presse sérieuse, si bien représentée à la réunion.

Après le banquet, M. Field, invité par le président, a pris la parole en ces termes :

MESSIEURS : Mes remerciements les plus sincères vous sont dus, et je vous les adresse du fond du cœur, pour la courtoisie bienveillante dont cette réunion est une preuve. Je sais bien que ce n'est pas ma personne, mais la cause dans le service de laquelle je suis engagé, qui a motivé cet empressement. Je ne vous en remercie que plus vivement.

Il s'agit d'une grande cause, en effet, et je tiens, par ce motif, à vous donner sur nos derniers travaux quelques renseignements précis. Vous m'excuserez s'ils ont forcément un air de compte rendu analytique.

La *Conférence de Bruxelles*, développement d'une idée poursuivie depuis quelques années par un certain nombre de mes compatriotes, est sortie d'une réunion tenue à New-York, dans le mois de mai dernier, chez l'un de nous. Dans cette réunion, un comité fut nommé pour concentrer nos efforts. J'en reçus la présidence, et M. Miles, ici présent, en fut l'actif et dévoué secrétaire. Ce comité était chargé de prendre des mesures pour la convocation d'une conférence de publicistes des divers pays de l'Europe et de l'Amérique, à l'effet de les consulter sur les meilleurs moyens de préparer un Code de droit international, ainsi que sur la marche à suivre pour assurer l'acceptation de ce Code. Malgré l'époque déjà avancée, on résolut de ne pas laisser passer l'année sans agir ; car l'état des affaires pressait. Des invitations furent envoyées au nom de la commission, et le 10 octobre la Conférence était réunie à Bruxelles. Malgré bien des empêchements dus à la longueur des distances et à la brièveté des délais, on peut dire que le monde savant s'y trouvait convenablement représenté. Vous en jugerez si vous voulez bien me permettre de dire quels étaient les hommes qui avaient répondu à notre appel, et ce qu'ils ont fait.

Je ne prétends pas les nommer tous ; je vous donne seulement un aperçu.

Nous étions plus de trente présents, et il y en avait peut-être autant d'autres qui avaient donné leur adhésion. Parmi ces derniers figure au premier rang le comte Sclopis, président du tribunal arbitral de Genève, dont la lettre sera publiée. Parlons de la France d'abord, puisque nous sommes en France. Elle était représentée par MM. Cauchy, Massé et Calvo, tous trois membres de l'Institut ; M. F. Passy, économiste, et M. Ameline, avocat. L'Allemagne avait envoyé, avec d'importantes lettres de M. d'Holzendorff et d'autres, M. Bluntschli, professeur de droit à Heidelberg, et auteur d'un ouvrage très-distingué sur le *Droit international codifié*.

De l'Espagne, nous avons M. de Marcoartu, ancien membre des Cortès, fondateur d'un prix de 7,500 francs pour un concours sur la question. De l'Italie, M. Mancini, ancien ministre d'Etat, député et professeur de droit à l'Université de Rome, et M. Pierantoni, professeur de droit à l'Université de Naples. De l'Angleterre, M. le chevalier Travers Twiss, ancien avocat de la Reine ; l'honorable Montague Bernard, professeur de droit à l'Université d'Oxford, et l'un des négociateurs du traité de Washington ; M. Sheldon Amos, professeur de droit à University-College à Londres ; M. Henry Richard, membre de la Chambre des Communes, et auteur de la célèbre motion qui a rendu son nom populaire dans le monde entier ; M. T. Webster et M. H. D. Jencken, avocats. De la Hollande, M. Bachiene, conseiller d'Etat, et M. Bredius, membre de la Chambre des représentants. De la Belgique, M. Visschers, docteur de droit, conseiller au Conseil des Mines ; M. Ahrens, professeur à l'Université de Bruxelles ; M. de Laveleye, professeur à l'Université de Liège ; M. Rolin-Jaequemyns, rédacteur en chef de la *Revue de Droit international* de Gand ; M. Goblet d'Alviella, docteur ès-sciences politiques et administratives ; M. Couvreur, rédacteur de l'*Indépendance Belge* et membre de la Chambre des Députés ; M. Bourson, directeur du *Moniteur Belge* ; M. Tempels, auditeur militaire ; M. Faider, avocat-général à la Cour de Cassation. La plupart de ces Messieurs ont écrit avec la plus haute distinction sur les questions de droit international. De l'Amérique, je ne dois pas oublier le docteur J. B. Thompson, venu exprès de Berlin, où il réside, pour nous assister. Nous étions, vous le voyez, en bonne compagnie.

Maintenant, qu'avons-nous fait ? Ici encore, je me borne à énumérer ; je ne commente pas.

Premièrement nous avons adopté, à l'unanimité, la résolution suivante :

“ La Conférence déclare : Qu'un Code international, définissant avec toute la précision possible les droits et les devoirs des nations et de leurs membres, est éminemment désirable dans l'intérêt de la paix, des bons rapports et de la prospérité commune. En conséquence, elle est d'avis que rien ne doit être négligé pour arriver à la préparation et à l'adoption de ce Code. La Conférence réserve la question de savoir jusqu'à quel point la Codification du Droit des Gens devrait être simplement scientifique, et jusqu'à quel point elle devrait être incorporée dans les traités ou conventions formellement acceptées par les États souverains.”

Secondement, nous avons adopté avec la même unanimité une autre résolution dont voici le texte : je n'ai pas à vous en faire remarquer l'importance.

“ La Conférence déclare qu'elle regarde l'arbitrage comme le moyen essentiellement juste, raisonnable, et même obligatoire pour les nations, de terminer les différends internationaux qui ne peuvent être réglés par voie de négociation. Elle s'abstient d'affirmer que dans tous les cas sans exception ce moyen peut être appliqué. Mais elle croit que ces exceptions sont rares. Et elle est d'avis qu'aucun différend ne doit être considéré comme insoluble qu'après une exposition complète de l'objet en litige, après un délai suffisant, et après qu'on aura épuisé tous les moyens pacifiques de le régler.”

Troisièmement, nous avons déclaré la Conférence permanente ; c'est-à-dire que nous avons constitué une Association “ *pour la réforme et la codification du droit des gens*,”\* et délégué, pour la représenter, un Conseil de douze membres. Ce Conseil se compose des neuf membres du Bureau actuel, plus trois membres qui lui ont été adjoints. Il est chargé de diriger les affaires de l'Association pour l'année présente, de désigner l'époque et le lieu de la prochaine session, et de provoquer la formation de comités nationaux ou locaux pour l'étude et l'élucidation de questions du droit des gens.

Les résolutions sur ce sujet ont été textuellement les suivantes :

\* Il n'est que juste de remarquer comme un symptôme de l'unité de vues qui de toutes parts pousse vers les mêmes efforts les hommes prévoyants et éclairés, que dès le mois de mars 1873 la *Société des Amis de la Paix* de France avait institué de son côté un *Comité d'Études pour la Réforme et la Codification des Lois Internationales*.

"1. La Conférence décide que le nom de l'association sera *Conférence internationale pour la réforme et la codification du droit des gens*.

Elle constitue, pour l'année courante, son bureau comme il suit :

*Président honoraire*, M. David Dudley Field.

*Président effectif*, M. Visschers.

*Vice-Présidents*, MM. Montague Bernard, Bluntschli, Giraud, et Mancini.

*Secrétaires-Généraux*, MM. de Laveleye, Miles, et Jencken.

2. Elle décide, en outre, que le président honoraire, le président, les vice-présidents, les secrétaires, et les autres membres de la Conférence constitueront, d'après leurs nationalités respectives, des comités locaux, avec pouvoir de s'adjoindre des membres, de nommer des secrétaires et de faire tout ce qui sera utile au but de la Conférence. Ces comités se tiendront en relations avec le président de la Conférence et lui adresseront des rapports.

3. Le bureau, constitué comme il est dit ci-dessus, forme, pour la présente année, la délégation permanente de la Conférence, avec mission de préparer un plan d'organisation de la Conférence, et de fixer l'époque et le lieu de la prochaine réunion. La délégation a le droit de se compléter par l'adjonction de trois membres."

Dès maintenant, et à la suite d'une première réunion des Bureaux, plusieurs travaux, relatifs à la monnaie internationale, au perfectionnement des instruments de crédit, aux taxes postales et à l'arbitrage, nous ont été promis. Voici le procès-verbal de cette réunion :

"En vertu de la décision prise par la Conférence Internationale dans sa séance du 13 octobre 1878, la délégation permanente de la Conférence (représentée par MM. David Dudley Field, Visschers, Miles, E. de Laveleye, lesquels se sont réunis le 14 octobre 1878 à midi, dans les salons de M. D. Dudley Field) a, en vertu des pouvoirs qui lui ont été conférés, complété son bureau en s'adjoignant M. Henry Richard (M. P.), M. F. Passy, et M. Adolphe Prins, avocat à Bruxelles. MM. Henry Richard et Passy, présents à Bruxelles, ont immédiatement pris part à la séance.

"La délégation s'occupe d'abord de la publication des travaux de la Conférence de Bruxelles et décide qu'au moyen des procès-verbaux et du compte rendu sténographique il sera fait un compte rendu donnant exactement la substance des observations échangées.

"Les lettres d'adhésion à la Conférence seront, suivant les circonstances, publiées *in extenso* ou par extraits.

"En exécution de la résolution de la Conférence en date du 13 octobre, les membres étrangers désignés par la délégation seront invités à former autour d'eux des Comités nationaux et locaux.

"Les membres de ces Comités ne seront pas de droit membres de la Conférence.

"La délégation restera juge des admissions à faire ultérieurement, soit qu'il s'agisse d'adjoindre des membres à la Conférence, ou d'inviter certaines personnes à assister aux séances.

"Les présidents des Comités seront invités à se tenir en correspondance avec la délégation centrale et à lui communiquer les listes de leurs membres et leurs réglemens.

"Sur la proposition de M. de Laveleye, il est entendu que l'on cherchera à s'assurer le concours des professeurs de Droit International et des personnes signalées par leur compétence.

"La délégation mettra à l'étude la question de la fixation du lieu et de l'époque de la prochaine réunion. Il paraît, toutefois, dès à présent désirable que la Conférence se réunisse dans la même ville que l'Institut International de Gand, deux ou trois jours après lui, de façon à profiter de ses travaux et de la présence de ses membres.

"En vue de cette réunion, la délégation s'occupera de choisir des sujets à soumettre à la discussion et de s'assurer des hommes compétents pour présenter des mémoires sur ces sujets.

"Dès maintenant elle indique les matières suivantes : Les brevets d'invention, les marques de fabrique et la propriété littéraire. (Questions proposées par M. Webster.)

"Les instruments de crédit. (Question proposée par M. Jencken.)

"La monnaie internationale. Les taxes postales. (Questions proposées par M. Passy.)

"L'arbitrage international. (Question proposée par M. de Marcoartu.)

"Ces questions seront traitées au point de vue international.

"La délégation s'occupera de l'organisation financière de la Conférence.

"Elle s'ajourne jusqu'à la prochaine convocation de son président."

Les questions que je viens d'énoncer ne sont, ai-je besoin de le dire, que des indications. Nous en attendons d'autres, en rappelant que le *siège social*, si je puis ainsi parler, est à Bruxelles, où se trouvent le président, M. Visschers, et le secrétaire, M. Prins (avocat dans cette ville). M. de Laveleye, secrétaire-général, habite Liège.

Ajoutons, enfin, que tandis que se préparait notre conférence, une autre institution, fruit des mêmes préoccupations, s'organisait à Gand. Je veux parler de l'*Institut de Droit international* fondé dans cette ville, en septembre dernier, dans le but de réunir dans un travail commun les jurisconsultes les plus éminents des deux mondes, afin d'arriver à dégager et à formuler scientifiquement ce que l'on peut appeler "*la conscience juridique du monde civilisé*." Cet Institut a pour président M. Mancini, et pour secrétaire-général M. Rolin-Jaequemyns ; plusieurs de nous en sont

membres. Avant de se séparer, la Conférence, tout en maintenant, d'accord avec l'Institut, la parfaite indépendance des deux Associations, a décidé d'entretenir avec lui des relations qui ne pourront que profiter à la bonne division des travaux et à la diffusion de leurs résultats. La tâche est vaste, et toutes les forces y doivent être employées le mieux possible. Voici du reste le rapport adopté pour l'établissement de ces relations avec l'Institut :

"La Conférence internationale pour la réforme et la codification du Droit des gens, convoquée à Bruxelles, le 10 octobre 1873, par les soins du Comité américain pour le Code international,

"Considérant :

"Que l'Institut de Droit international, fondé à Gand, le 10 septembre 1873, est une association exclusivement scientifique, et que son but est de favoriser le progrès du Droit international, de formuler les principes généraux, et de donner son concours à toute tentative sérieuse de codification graduelle et progressive du Droit international ;

"Que, conformément à ce but, l'Institut de Droit international a, dès à présent, mis à l'étude les trois sujets suivants :

"Arbitrages internationaux et procédure à suivre dans leur emploi ;

"Examen des trois règles de Droit international maritime proposées dans le traité de Washington ;

"Règles du Droit international privé destinées à assurer la décision uniforme des conflits entre les différentes législations civiles et criminelles ;

"Que la plupart de Juristes de Droit international, qui sont invités par le Comité américain, sont membres de l'Institut de Gand ;

"Que le Comité promoteur de la Conférence de Bruxelles ne se compose pas seulement de Juristes, mais aussi d'hommes distingués comme hommes politiques, publicistes, économistes, philanthropes, et que son but est de favoriser le progrès du Droit international dans l'application pratique et dans l'opinion publique ;

"Déclare :

"1°. Que, à ses yeux, il est conforme au but et à l'intérêt des deux Associations, tout en conservant à chacune la plénitude de son indépendance, de s'aider mutuellement ;

"2°. Que, par sa nature et sa composition, l'Institut du Droit international semble remplir les conditions nécessaires pour fonctionner comme un sénat de juristes, éminemment apte à faire les travaux préparatoires indispensables à la réception et à la promulgation d'un Code de Droit international, et qu'il y a lieu de le seconder dans l'accomplissement de cette tâche ;

"3°. Que, de son côté, la Conférence se réserve d'examiner, à tous les points de vue, et particulièrement au point de vue politique, économique et social, les résultats de ces travaux, comme aussi de se livrer, en évitant

autant que possible les doubles emplois, à tous les travaux qu'elle jugerait nécessaires, et d'agir, soit après l'examen des travaux de l'Institut, soit en attendant qu'elle ait pu se livrer à cet examen, de la manière qui lui paraîtra le plus favorable au développement des rapports pacifiques entre les peuples, et au progrès de la civilisation internationale."

Je vous ai fait, messieurs, un court mais fidèle exposé de ce qu'on a fait à notre conférence de Bruxelles. J'ai dit que je ne ferais ni commentaires ni phrases. Mais je sais que vous avez un proverbe en France qui dit : "Il n'y a que le premier pas qui coûte." Le premier pas est fait. Nous vous demandons : Voulez-vous nous aider à en faire d'autres et nous soutenir dans la marche en avant à laquelle nous convions tous les esprits généreux et pratiques du monde ?

### *Translation.*

#### CONFERENCE FOR THE REFORM AND CODIFICATION OF THE LAW OF NATIONS.

Account given October 25, 1873, at a banquet in the Café de la Paix, Paris. M. Frederic Passy, Vice-President of the Society of the Friends of Peace, presided at the banquet. Opposite him sat Mr. Field, Honorary President of the Conference which met at Brussels last September. At their sides were Mr. Washburne, Minister of the United States; M. Cauchy, Member of the Institute; General Read, Consul-General of the United States; M. Paul Biollay, "Conseiller Referendaire à la Cour des Comptes"; M. Joseph Garnier, Perpetual Secretary of the Society of Economists; MM. Charles Fauvety and Edmond Thiaudière; M. de Molinari, of the "Débats"; M. Henry Bellaire, Secretary-General of the Peace Society; M. Charles Calvo; M. Macon, "Directeur de la Correspondance Helvétique"; M. Jules Clère, of the "National"; Dr. James B. Miles, of Boston, Secretary of the American Committee for the Reform of the Law of Nations, and of the American Peace Society; M. Bryan, of the American Register; Dr. Raffinesque, etc., etc.

Among the toasts drunk must be mentioned that of M. Frederic Passy to America, in the person of her eminent representatives, to which Mr. Washburne responded in an eloquent discourse; those of M. Charles Fauvety to Justice; of Dr. Miles to France; of Mr. Henry Bellaire to Mr. Henry Richard, the illustrious Secretary of the London Peace Society, whose voice, in winning a vote of the English House of Commons for arbitration, has resounded through the world; and finally the toast of M. Edmond Thiaudière to the serious press, so well represented at this reunion.

After the banquet, Mr. Field, invited by the president, spoke as follows:

Gentlemen: My most sincere thanks are due to you, and I give them from the bottom of my heart, for the courtesy of which this reunion is a proof. I know very well that it is not myself,

but the cause in which I am engaged, that has brought about this demonstration. I thank you all the more for that. The cause is indeed a great one, and for this reason I desire to give you some precise information upon our late work. You will excuse me if my statement has the air of a business document.

The *Brussels Conference*, development of an idea entertained for some years by a number of my countrymen, was the immediate result of a meeting held in New York last May at the house of one of us. At this meeting a committee was chosen for the concentration of our efforts. I was made the president, and Mr. Miles, here present, became the active and devoted secretary. This committee was charged with the duty of taking measures for the convocation of a conference of publicists from different countries of Europe and America, for the purpose of consulting upon the best means of preparing a Code of International Law and of procuring its acceptance. Though the time was already far advanced, we resolved not to let the year pass without action, for the state of public affairs seemed to require action. Invitations were accordingly given in the name of the committee, and on the 10th of October the Conference began its session in Brussels. In spite of obstacles resulting from the distances to be traveled, and the shortness of time, the scientific world was fittingly represented. You shall judge of this if you permit me to tell you who answered this appeal, and what they did. I do not give all the names; I mention a number, from which you may gather the character of the Conference. There were more than thirty present, and there were perhaps as many more who sent in their adhesion. Among the latter, and in the front rank, was Count Sclopis, President of the Arbitral Tribunal of Geneva, whose letter will be published. In mentioning others, let me speak of France first, since we are in France. She was represented by MM. Cauchy, Massé, and Calvo, all three members of the Institute; by M. F. Passy, economist; and M. Ameline, advocate. Germany sent, with important letters from Mr. d'Holzendorff and others, Mr. Bluntschli, Professor of Law at Heidelberg, and author of a distinguished work on "*Droit International Codifié*." From Spain we had Mr. de Marcoartu, formerly member of the Cortès, and founder of a prize of 7,500 francs for the best essay on international codification. From Italy we had M. Mancini, formerly Minister of State, Deputy, and Professor of Law in the University of Rome; and M. Pierantoni, Professor of Law in the University



of Naples. From England we had Sir Travers Twiss, formerly Queen's advocate ; the Honorable Montague Bernard, Professor of Law at the University of Oxford, and one of the negotiators of the treaty of Washington ; Mr. Sheldon Amos, Professor of Law at University College, London ; Mr. Henry Richard, member of the House of Commons, and mover of the celebrated resolution which has rendered his name popular throughout the world ; Mr. T. Webster and Mr. H. D. Jencken, barristers. From Holland we had M. Bachiene, Counsellor of State, and M. Bredius, member of the House of Representatives. From Belgium we had M. Visschers, Doctor of Law, "Conseiller au Conseil des Mines" ; M. Ahrens, Professor in the University of Brussels ; M. de Laveleye, Professor in the University of Liège ; M. Rolin-Jacquemyns, editor-in-chief of the "Revue de Droit International" at Ghent ; M. Goblet d'Alviella, Doctor of Political and Administrative Sciences ; M. Couvreur, editor of the "Indépendance Belge," and member of the Chamber of Deputies ; M. Bourson, director of the "Moniteur Belge" ; M. Tempels, Military Auditor ; and M. Faider, Advocate-General at the Court of Cassation. Most of these gentlemen have written with distinction on questions of international law. From America I must not forget to mention Dr. Thompson, who came expressly from Berlin, where he resides, to meet with us. We made, you see, a goodly company.

Now, what have we done ? I mention only results ; I make no comment.

First, we adopted unanimously the following resolutions :

"The Conference declares : 'That an international code, defining with all possible precision the rights and the duties of nations and of their members, is eminently desirable in the interest of peace, good understanding, and common prosperity. Consequently, it is of opinion that nothing should be neglected to promote the preparation and adoption of such a code.

"The Conference reserves the question how far the codification of the law of nations should be simply scientific, or how far it should be incorporated into treaties or conventions formerly accepted by sovereign states."

Secondly, we adopted with the same unanimity another resolution, the importance of which I beg you to observe :

"The Conference declares that it regards arbitration as the means essentially just, reasonable, and even obligatory upon nations to determine

their international differences, which can not be settled by negotiation. It does not affirm that this is applicable to all cases without exception. But it believes that these exceptions are rare, and it is of opinion that no difference should be considered insoluble until after a complete exposition of the point in dispute, after a sufficient delay, and after the most pacific means of settlement shall have been exhausted."

Thirdly, we declared the Conference permanent—that is to say, we formed an "Association for the Reform and Codification of the Law of Nations,"\* and chose a Council of twelve members to represent it. This Council consists of nine members of the Board and three additional members. It is authorized to manage the affairs of the association for the present year, to designate the time and place of the next session, and to promote the formation of national or local committees for the study and elucidation of questions of international law.

The resolutions on this subject were as follows :

"1. The Conference decides that the name of the association shall be 'The International Conference for the Reform and Codification of the Law of Nations.' It constitutes for the current year its board of officers, as follows: Honorary President, Mr. David Dudley Field; Active President, Mr. Visschers; Vice-Presidents, Messrs. Montague Bernard, Bluntschli, Giraud, and Mancini; General Secretaries, Messrs. de Laveleye, Miles, and Jencken.

"2. It decides, moreover, that the Honorary President, the President, the Vice-Presidents, the Secretaries, and the other members of the Conference shall constitute in their respective countries local committees, with power to add members, to name secretaries, and to do all that may promote the purposes of the Conference. These committees shall maintain relations with the President of the Conference, and make their reports to him.

"3. The Board thus constituted forms, for the present year, the permanent delegation of the Conference, with the duty of preparing a plan of organization for the Conference, and to fix the time and place for the next reunion. The delegation has the right to complete its organization by the addition of three members."

From this time on, and in consequence of the first reunion of the delegates in Brussels, several contributions of papers relating to international money, to the perfecting of instruments of credit,

\* It is but just to remark here, as a symptom of the similarity of views which moves thoughtful men from different quarters to similar efforts, that since March, 1873, the Society of the Friends of Peace in France has had a standing committee on the reform and codification of international law.

to postal taxes, and to international arbitration, have been promised to us.

Here is the *procès-verbal* of this reunion :

"By virtue of the decision taken by the International Conference of October 13, 1873, the permanent delegation of the Conference (represented by Messrs. Field, Visschers, Miles, and Laveleye, who assembled at noon, October 14, 1873, in the *salon* of Mr. Field) has, in pursuance of the power conferred on it, completed its Board by adding Mr. Henry Richard (M. P.), M. F. Passy, and Mr. Adolphe Prins, advocate at Brussels. Messrs. Richard and Passy, being present in Brussels, immediately took part in the sitting.

"The delegation considered first the publication of the transactions of the Brussels Conference, and decided that, with the aid of the *procès-verbaux* and the stenographic notes, a report should be made giving the substance of the discussions. The letters of adhesion to the Conference, or extracts from them, are to be published according to circumstances.

"In pursuance of the resolution of the Conference of October 13th, the foreign members, designated by the delegation, will be invited to form about them national and local committees. The members of these committees are not to be of right members of the Conference.

"The delegation will remain judge of admissions to be made hereafter, whether of members of the Conference or of persons to take part in the meetings.

"The presidents of committees will be invited to hold correspondence with the central delegation, and to communicate to it the lists of their members and their regulations.

"On the proposition of M. de Laveleye, it was agreed that efforts should be made to secure the co-operation of professors of international law, and of others distinguished for their qualifications.

"The delegation will determine the place and time for the next session. It appears, however, desirable for the present, that the Conference should meet in the same city with the International Institute of Ghent, two or three days after it, to profit by its labors and the presence of its members.

"In anticipation of this reunion, the delegation will select subjects for discussion, and endeavor to make sure of competent persons to present papers on the subjects.

"For the present, the following subjects are designated : 'Patents for Inventions, Trade-marks, and Literary Property,' questions proposed by Mr. Webster. 'Instruments of Credit,' question proposed by Mr. Jencken. 'International Money and Postal Taxes,' questions proposed by M. Passy. 'International Arbitration,' question proposed by M. de Marcoartu. These questions are to be treated in an international point of view.

"The delegation will take into consideration the financial organization of the Conference. It then adjourned, subject to the call of the president."

The questions which I have mentioned are, I need hardly say, only indications of those with which the association will occupy itself. We wait for others, remembering that the social residence, so to speak, of our association, is at Brussels, where reside Mr. Visschers, our president, and our secretary, Mr. Prins. M. de Laveleye, general secretary, resides at Liège.

Let me now add that, while our Conference was in the course of formation, another Institution, fruit of the same general desires, was organized at Ghent. I speak of the Institute of International Law, founded in September last, for the purpose of bringing together, in a common work, the most eminent lawyers of both continents, in order to work out and formulate scientifically what may be called "the juridical conscience of the civilized world." This Institute has for its president M. Mancini, for its general secretary M. Rolin-Jacquemyns, and several of us are members of it. Before separating, the Conference, desiring always to maintain, in accord with the Institute, the perfect independence of the two associations, decided to establish with it relations which would help to divide the labor and diffuse the results. The undertaking is great, and all the means possible should be used to accomplish it.

Observe now the resolutions adopted for the establishment of our relations with the Institute :

"The International Conference for the Reform and Codification of the Law of Nations, convened at Brussels, October 10, 1878, on the invitation of the International Code Committee of America ;

"Considering :

"That the Institute of International Law, founded at Ghent, September 10, 1878, is an association exclusively scientific, and that its aim is to promote the advancement of international law, to formulate its general principles, and to aid all serious attempts at gradual and progressive codification of the law of nations ;

"That, conformably to this view, the Institute of International Law has for the present confined its studies to the three following subjects, viz. : International Arbitration, and the procedure proper for that purpose ; an Examination of the three rules of Maritime International Law proposed in the treaty of Washington ; and, Rules of Private International Law, intended to secure a uniform decision in conflicts between differing legislations, civil and criminal ;

"That the majority of jurists concerned in international law, who were invited by the American committee, are members of the Institute ;

"That the Brussels Conference is composed not only of jurists, but of

others distinguished as statesmen, publicists, economists, and philanthropists, whose aim is to favor the progress of international law in its practical application and in public opinion ;

" Declares :

" 1st. That in their view it is conformable to the aim and interest of the two associations, preserving always to each the plenitude of its independence, to aid each other.

" 2d. That by its nature and its composition the Institute of International Law seems to fulfil the conditions necessary to enable it to work as a senate of jurists, eminently fit for the preparatory labor indispensable to the reception and promulgation of a code of international law, and that it should be assisted in the accomplishment of this task.

" 3d. That, on its part, the Conference reserves for itself an examination in all points of view, particularly those which are political, economical, and social, of the results of the labors of the Institute, and, avoiding as much as possible double work in the two associations upon the same subject, will devote itself to the task which it may judge necessary, and will exert itself, either by an examination of the labors of the Institute, or while waiting for that examination, in such manner as may appear to it most favorable to the development of pacific relations between the nations, and the progress of international civilization."

I have thus given you, gentlemen, a faithful report of what we did at Brussels. I said that I would make no comment. But I remember that you have a French proverb which says, " It is the first step only that costs." This first step has been taken. We ask, Will you help us to take other steps in that forward march, to which we invite all the practical and generous spirits of the world ?

Address of Mr. Field at a banquet in Rome, given November 27, 1878, to Mr. Henry Richard, a member of the British Parliament, who had distinguished himself in the House of Commons, by the passage of a resolution in favor of arbitration for the settlement of international disputes.

## DISCORSO AL BANCHETTO IN ROMA

DEL 27 NOVEMBRE 1878.

SIGNORI MINISTRI, SIGNORI DEPUTATI, SENATORI ED ILLUSTRI CONVITATI: Invece di parlare nel mio patrio linguaggio, o nello idioma francese, che da lungo tempo è l'istrumento delle relazioni tra tutte le genti, io preferisco per mia regola di viaggio la lingua del paese, ove io mi trovo. Ciò mi sembra richiesto dalla buona cortesia. Ma più specialmente voglio così fare, ora che parlo in Italia ad italiani.

Voi certamente mi perdonerete gli errori, che potrò commettere, perchè non ho la pretensione di parlar bene il vostro linguaggio.

Dirò brevi parole di congratulazione e di simpatia per questa nazione, ch'è ad un tempo la più antica e la più giovane delle nazioni.

Noi americani pensiamo che abbiamo qualche specie di diritto a parlare agl'italiani, perchè consideriamo che fu un vostro ifaliano, che scopri il nostro continente, ed un altro italiano che gl'impose il nome di America.

Il primo, grande scopritore e navigatore, ha rivelato il continente di là dall' Oceano agli occhi dell' Europa meravigliata. L'altro gli ha dato il battesimo. Questa è una delle grandi ragioni della simpatia, che esiste sempre in America per l' Italia, e che si manifestò appena il vostro paese fece un passo avanti sopra il cammino della libertà.

Venticinqu'anni or sono, quando a noi giunse in America la notizia delle riforme qui in Roma proclamate, vi fu a Nuova York, mia patria, un gran *meeting* di congratulazione, in cui io proposi le risoluzioni, tra le quali ve n'era una, che diceva: *Che*

*noi aspettavamo il tempo, in cui l'Italia sarebbe stata libera dalla Calabria alle Alpi.*

Da quell'anno vi sono stati in questa contrada grandi avvenimenti, ora favorevoli, ed ora contrari. Ma adesso dopo lunghi anni, quanti fanno una generazione, il sogno, che io feci, è divenuta la realtà del presente.

Io vedo l'Italia come un gigante che si sveglia, ristorato dopo un sonno di mille anni, e che guarda intorno le Alpi e i due mari e riprende di nuovo il suo cammino di libertà e di gloria. Noi la salutiamo come la benvenuta al consorzio delle grandi nazioni con entusiastico applauso.

Noi speriamo e crediamo che essa difenderà la sua indipendenza, la sua unità, la sua libertà ben ordinata sino a quando i monti di Albano guarderanno il Tevere ed il raggio del sole scenderà sopra i templi e i monumenti di Roma !

#### *Translation.*

MINISTERS, SENATORS, DEPUTIES, AND GENTLEMEN : Instead of speaking in my own tongue, or in French, the language so long employed for international intercourse, I prefer, when I am traveling, to use the language of the country where I happen to be. This appears to me a rule of courtesy. But especially do I wish to use Italian, so far as I am able, when I speak in Italy to Italians. And you will overlook my mistakes, I am sure, as I do not pretend to speak your language well.

I desire to speak a few words of congratulation and sympathy for this nation, which is at once the oldest and the youngest of the nations. We Americans think that we have a kind of right to address ourselves to Italians, because we remember that it was an Italian who discovered our continent, and another Italian who gave it the name of America. The first great discoverer and navigator, as he was, revealed the land from out the sea to the eyes of wondering Europe. The other performed its baptism. These are reasons for sympathy which ever exist in America for Italy, sympathy which made itself manifest the moment your country began anew its advance in the ways of freedom. Twenty-five years ago, when news came to America of reforms proclaimed in Rome, we held in New York a great meeting of congratulation, where I proposed resolutions, and among them one

which declared that we looked forward to the time when Italy should be free, from Calabria to the Alps.

Since then great events have happened, some favorable and some unfavorable. But now after long years—a generation, indeed—my dream has become a reality.

I see Italy as a giant newly awakened and refreshed from its sleep of a thousand years, guarding all that lies between the Alps and the two inclosing seas, and beginning anew the march of liberty and of glory.

We welcome, with enthusiastic applause, the entrance of Italy into the community of great nations. And we hope and believe that she will defend her independence, her unity, and her well-ordered liberty, so long as the mountains of Albano look upon the Tiber, and the rays of the sun fall upon the temples and monuments of Rome.



## SPEECHES IN CONGRESS AND BEFORE THE ELECTORAL COMMISSION.

Mr. Field was elected a member of Congress on the 2d day of January, 1877, and took his seat on the 11th, to fill the unexpired term of Mr. Smith Ely, Jr., who had been chosen Mayor of New York. The subject then uppermost in the minds of Congress and of the people was the disputed election of President. Though Mr. Field had voted for Mr. Hayes, he was convinced that Mr. Tilden had been elected, and should be so declared, and his efforts were directed to that end from the time of the election to the seating of Mr. Hayes. When Mr. Field arrived in Washington he found that a joint committee of the two Houses had been appointed to devise means for a peaceful solution of the problem, the idea occasionally entertained of a separate count by the House of the votes for President, and by the Senate of the votes for Vice-President, having been practically abandoned. The only course then remaining was to agree upon the means of arriving at a count and declaration of the votes in joint session. The Electoral Commission appeared to him to be the best means, and he joined earnestly in promoting it. He was disappointed, however, in the selection of the Commissioners, and in the decisions of the Commission, and manifested his disappointment and disapprobation in the subsequent proceedings.

He endeavored, moreover, to secure the passage of a bill for the designation of an officer to act as President, in certain unprovided-for contingencies, between the happening of a vacancy and the choice of a new President, and of another bill to provide a remedy against wrongful intrusion into office of President or Vice-President. The disagreement between the Houses on the army appropriation bill became also a subject of warm discussion, and he made a speech on that. He made, in fact, six speeches in the House, and one before the Commission. Five of the seven are here reprinted.

The Electoral Commission act established a temporary commission consisting of fifteen members, being five justices of the Supreme Court of the United States, and five members of each House of Congress. In case of more than one return of electoral votes from a State, and an objection made to any of them, the papers were to be submitted to the Commission, which was to decide, by a majority of its members, "whether any and what votes from such State are the votes provided for by the Constitution of the United States, and how many and what persons were duly appointed electors." The counting of the votes was then to proceed in conformity with this decision, unless upon objection taken the two Houses should "separately concur in ordering otherwise, in which case such concurrent order shall [should] govern." The Commission was thus made "a *provisional tribunal*, raised to examine the returns in the first instance," as Mr. Conkling called it in a joint meeting of the two Houses.

The count began on Thursday, the first of February, in the presence of both

Houses, and the certificates were opened by the President of the Senate, in the alphabetical order of the States, beginning with Alabama. The votes of that State, and of Arkansas, California, Colorado, Connecticut, and Delaware were counted without objection. When the certificates from Florida were opened, it appeared that more than one return had been received. Mr. Field made objection to the certificate first read. Thereupon the following communication was made to the Electoral Commission:

"HALL OF THE HOUSE OF REPRESENTATIVES, }  
February 1, 1877.

"TO THE PRESIDENT OF THE COMMISSION:

"More than one return or paper purporting to be a return or certificate of electoral votes of the State of Florida, having been received and this day opened in the presence of the two Houses of Congress, and objections thereto having been made, the said returns, with all accompanying papers, and also the objections thereto, are herewith submitted to the judgment and decision of the Commission, as provided by law.

T. W. FERRY,

*"President of the Senate."*

The two Houses separated, and the papers were submitted to the Commission, before which Mr. Field made the following argument, February 2, 1877.

### THE FLORIDA ELECTION.

MR. PRESIDENT AND GENTLEMEN OF THE ELECTORAL COMMISSION: It will be my endeavor, in the statement which I shall make, to set forth with as much conciseness as I can the facts that we expect to prove and the propositions of law which we hope to establish.

The power devolved by the Federal Constitution upon the States of this Union was, in the State of Florida, exercised by the Legislature of the State directing the appointment of presidential electors to be made by the qualified voters of the State at a general election. That election was held on the 7th of November, 1876. It was, so far as we are informed, quiet and orderly throughout the State, and it remained only to gather the result of the voting. That result was a majority in favor of the electors whom, for convenience' sake, I will designate as the Tilden electors. Nevertheless, a certificate has come here signed by the then Governor of the State, certifying that the Hayes electors had a majority of the votes. By what sort of jugglery that result was accomplished I take it upon me to explain.

By the laws of the State the counties are divided into polling-precincts, and the votes of the polling-precincts are returned to the county clerk at the county seat, where they are canvassed, and the county canvassers certify the result to the State canvassers.

I have occasion to mention canvassers only in one county. That county was decisive of the result ; but, if it were not, *ex uno disce omnes*. The county to which I refer is the county of Baker. The canvassers were by law to be the county judge, the county clerk (or rather, I think, he is called the clerk of the circuit court for the county, but I call him for convenience the county clerk), and a justice of the peace, to be by them called in for their assistance. In case either the judge or the clerk is for any cause absent, the sheriff of the county is to be called in his place. The law provides that the canvass by the county canvassers shall be made on the sixth day after the election, or sooner if the returns are all received.

In this county there were but four precincts, and the returns from them were all received in three days. On the 10th of November the county clerk, considering that, the returns being in, further delay in the canvass might be embarrassing—for what reasons it does not devolve on me to say—requested the county judge to join him in the canvass. The county judge refused. The clerk then asked the sheriff to join him, but he declined. The clerk thereupon called to his assistance a justice of the peace and made the canvass, and a true canvass it was, as all parties seem to agree. I have never heard anywhere the suggestion that the votes as certified by them were not the true votes. But it so happened that the county judge, on the same day, the 10th, issued a notice to the county clerk and to a justice of the peace to attend him at the county seat on the 13th, which, as you will remember, was just six days after the election, at noon, for the purpose of making the count. On that day and hour the county clerk and the justice thus requested attended. The county judge, however, absented himself, though he had given the notice. He was invited and urged to go on with the canvassing. The record shows that he laughed, and said he thought that what had been already done was enough. The sheriff was then applied to and he refused. Thereupon the county clerk and a justice of the peace—another justice called in—re-canvassed the votes, giving the same result precisely, and certified them to the State canvassers, stating in the certificate the reasons why neither the county judge nor the sheriff was present. The office of the clerk was then closed for the day.

In the evening of that day the same county judge and the same sheriff, taking to their assistance a justice of the peace who

had been commissioned by Stearns only on the 10th and who had never acted before, entered the office surreptitiously, opened a drawer and took out the returns, threw aside two precincts, certified the two remaining, and sent that certificate to the State canvassers. No just man will say that this certificate of these men, made under these circumstances, in the darkness of night, throwing out two precincts, and sent thus to the State canvassers, without a reason given why the county clerk was not present, should be taken as the true voice of the county. That I do not misrepresent the facts in any respect, let me read to you the testimony as it will appear upon the record to be laid before you. This is the testimony in respect of this third canvass, this false and fraudulent canvass, which I will read as given by the sheriff :

Here follows the testimony, which it is not necessary now to reprint.

Now let us go from this county canvass to the State canvass. When the State canvassers were at work, there were certain significant telegrams passing between Florida and Washington ; I omit the names of the correspondents, except that of the Governor, Stearns, the man whose certificate is before you, certifying to the election of the Hayes electors. The examination is thus reported :

Q. "Do you recollect any telegram at Lake City, about the 25th of December, asking—(say the chairman of the National Republican Committee)—any questions about attacking the returns?"

A. "I remember one dispatch (I can not give the date), asking on what grounds they should assail these counties, or words to that effect."

Q. "What was the answer?"

A. "There was a dispatch subsequently received (whether or not it was the answer to it, you must draw your own conclusion). The words in it were 'fraud, intimidation.' There was another word which may have been 'violence'; but I am not sure that it was violence."

Thereupon the State canvassers did what? They took the third canvass from Baker County and amended it as appears in the "Congressional Record" of February 1, page 65, adding "amended by canvassing all the precinct returns," and that statement of the full canvass is the true one as to Baker County ; that

is, they got at a true result in respect to that county by taking the false certificate and amending it so as to take in all the returns. But what did they then do? Stearns was a candidate for the office of Governor. He was then Governor, and he was a candidate for the succession. His opponent was Mr. Drew. The canvassers were Stearns's appointees, to go out of office with him, or to remain in office if he were counted in. They took the returns from the other counties and threw out enough to give the State to the Hayes electors and to Stearns as Governor.

Thus the matter stood upon the State canvass then made. You will observe that it gave the true vote of Baker County, but eliminated from the votes of other counties certain precincts, enough to elect their patron Stearns. But it did not remain so, as I will show in a moment; for this elimination being declared by the Supreme Court illegal, the canvassers thereupon, in order to prevent a majority appearing for the Tilden electors, recalled their amendment of the Baker County false return, and used the original with all its falsehood. These are the facts which we offer to make good by evidence, as the Commission may prescribe, by a cloud of witnesses, and by a host of documents, and they show, beyond peradventure, that the return to which we object is a *false return*. Let us now see what followed.

This monstrous fraud being so far accomplished, the people of the State took it upon themselves to right the wrong, and they worked with a spirit and an approach to success which do them all honor. Not even your own native State of New Hampshire, Mr. President, could have stood up for its rights more manfully. If such a fraud had been perpetrated there, you would have heard a voice from her people that would have shaken the everlasting foundations of her granite hills. From peak to peak, and from the westernmost peak to the shining sea, you would have heard a roar of dissent and of indignation. So their brethren of Florida raised their voices through all the flowery peninsula, and they effected the results which I will now narrate. First, Drew, the candidate for Governor on the other side, went into the courts of law, as a law-abiding citizen should do, and will ever do so long as he can get justice in the courts, albeit that when he finds he can not get it there he may try to get it elsewhere. He went into the Supreme Court of the State and applied for a mandamus to compel this canvassing board to restore to their canvass the eliminated precincts, and the Supreme

Court decided that the State canvassers had no power under the laws of Florida to eliminate votes, but were bound to count every lawful vote put into the ballot-box ; that they were neither electors nor judges otherwise than of the votes put in ; and thereupon in obedience to this decision they restored to the canvass the rejected precincts and certified a majority for Drew. Upon this, Drew took his office, and is now the lawful and accepted Governor of the State.

What did the Tilden electors do ? They commenced in a Circuit Court of Florida, which had competent jurisdiction, an information in the nature of a *quo warranto* against the Hayes electors. They charged in the information that they, the relators, were the lawful claimants of the office, and that the others were usurpers. That information was commenced before the Hayes electors voted on the 6th of December. The case proceeded in the regular course of legal proceedings until it came to trial and judgment, first upon a demurrer, and then, the demurrer being overruled and an answer interposed, upon the issues and proofs ; and here is the judgment of the court. After the recitals it thus declares :

"It is therefore considered and adjudged that said respondents (the Hayes electors, Humphreys and the rest) were not, nor was any one of them, elected, chosen, or appointed as such electors or elector, or entitled to receive certificates or certificate of election or appointment as such electors or elector, and that the said respondents were not, upon the said sixth day of December, or at any other time, entitled to assume or exercise any of the powers and functions of such electors or elector, but that they were, upon the said day and date, mere usurpers.

"And it is further considered and adjudged that the said relators, Robert Bullock, Robert B. Hilton, Wilkinson Call, and James E. Yonge [the Tilden electors] all and singular, were at said election duly elected, chosen, and appointed electors of President and Vice-President of the United States, and were on the said 6th day of December, 1876, entitled to be declared elected, chosen, and appointed as such electors, and to have and receive certificates thereof, and upon the said day and date, and at all times since, to exercise and perform all and singular the powers and duties of such electors, and to have and enjoy the pay and emoluments thereof."

So much for the action of the *judicial department* of Florida. Everything was done, I take it upon me to say, which it was possible to do ; so that I am warranted in asserting that, if there were any way known to the law by which this defrauded State

could have righted itself through the courts of the State, that way was in this case taken.

In the mean time the Hayes electors had voted and sent their lists of votes to the President of the Senate, with the certificate of Stearns to their appointment. There was no canvass or certificate of the State canvassers to their appointment other than that first made, which the Supreme Court had ordered to be rectified on the application of Mr. Drew, the rectification of which, therefore, could go no further than the canvass of the Governor's vote. The same rectification, applied to the electoral votes, would, of course, give the majority to the Tilden electors, but to avoid this result the canvassers proceeded to alter the votes first certified by them for Baker County, and reduced the count to the two precincts mentioned in the third and false return of the county canvassers. This act was rebuked by the Supreme Court, in an order directing the State canvassers to confine their action under the mandamus to the votes for Governor; so that there really appears upon the records of the State canvassers no semblance of authority for Stearns's certificate other than the first canvass, which the Supreme Court declared to be illegal and false.

Now look at what the *Legislature* of Florida has done. The Legislature is the department of the Florida government which could alone direct how the power devolved by the Federal Constitution should be performed. This Legislature has passed two acts to which I call your attention. In view of the fact that the Supreme Court had made the decision which I have mentioned, the Legislature passed :

"An act to provide for a canvass according to the laws of the State of Florida, as interpreted by the Supreme Court, of the votes for electors of President and Vice-President cast at the election held November 7, 1876."

This statute was approved January 17th. It provided that the Secretary of State, the Attorney-General, and the Comptroller of Public Accounts, or any two of them, together with any other member of the Cabinet who might be designated by them, should meet forthwith at the office of the Secretary of State, pursuant to a notice to be given by the Secretary, and proceed to recanvass the votes. They did meet and recanvass pursuant to this law, and they certified the result according to the fact, giving the majority to the Tilden electors. A second statute declared that the Tilden electors, naming them, were

elected on the seventh day of November, and that they had voted ; it directed that the same electors should meet again ; that the Governor should give them a certificate of their election, pursuant to the recanvass ; and that they should make out duplicate lists of the votes, and transmit them to the President of the Senate at Washington. The proceedings under that law make up the third return now before the Commission.

The return No. 1 was made by the Hayes electors and sent with the certificate of Stearns as Governor. Return No. 2 contains the certificates of the Tilden electors without the certificate of the Governor, but with a certificate of the Attorney-General, the only dissenting member of the board of State canvassers, certifying that they were elected. Then return No. 3 contains the action of the State authorities subsequent to the two first, for the purpose of confirming, so far as it was possible for the State authorities to do it, the second return ; and they therefore not only passed a law for the recanvass of the votes, which recanvass took place and resulted in a certificate of the election of the Tilden electors, but they passed another act reciting that the election had resulted in favor of the Tilden electors, and that these electors had met and voted on the 6th of December, but without a certificate of the Governor, and directing the Governor of the State to forward a supplementary certificate for its confirmation ; and directing, moreover, for abundant caution, that there should be new lists made out and a new certificate given by these electors, who were to be reassembled for the purpose ; the certificates, all to be forwarded to the President of the Senate, as they would have been but for the conspiracy in November. These papers make, as I have said, the third return. I will read the recital in this act of the Legislature of Florida :

“ And whereas the board of State canvassers, constituted under the act approved February 27, 1872, did interpret the laws of this State defining the powers and duties of the said board in such manner as to give them power to exclude certain regular returns, and did in fact, under such interpretation, exclude certain of such regular returns, which said interpretation has been adjudged by the Supreme Court to be erroneous and illegal ;

“ And whereas the late governor, Marcellus L. Stearns, by reason of said illegal action and erroneous and illegal canvass of the said board of State canvassers, did erroneously cause to be made and certified lists of the names of the electors of this State, containing the names of the said Charles H. Pearce, Frederick O. Humphreys, William H. Holden, and Thomas Long [being the Hayes electors], and did deliver such lists to said persons, when



in fact the said persons had not received the highest number of votes ; and, on a canvass conducted according to the rules prescribed and adjudged as legal by the Supreme Court, were not appointed as electors or entitled to receive such lists from the Governor ; but Robert Bullock, Robert B. Hilton, Wilkinson Call, and James E. Yonge [the Tilden electors] were duly appointed electors, and were entitled to have their names compose the lists made and certified by the Governor, and to have such lists delivered to them :

*“ Now, therefore, the people of the State of Florida, represented in Senate and Assembly, do enact, etc.”*

The certificate states in effect that the electors who met and voted on the 6th of December were the true choice of the people of Florida ; the same electors reassembled and made new lists ; they did not vote anew because they had been required to vote on the 6th of December, but they did certify anew that they had thus voted on that day, and that certificate, with the other certificate, was forwarded in due form, as I have stated, to the President of the Senate at this Capitol.

Thus, if the Commission please, have I shown that the first return, purporting to contain the votes of the State of Florida, for President and Vice-President, the one return to which we object, is not only a false return, but that its falsehood has been declared to you by the State, through all its departments, legislative, executive, and judicial.

But we are told that the certificate of the Governor, Stearns, which has been forwarded to Washington annexed to the lists of votes of the Hayes electors, countervails all this evidence, and that no matter what amount of testimony we may offer, documentary or oral, we can not invalidate the signature of the Governor, Stearns. It is to that question that I shall devote what remains of my argument. It is putting the question in an erroneous form to frame it thus : “ You can not go behind the certificate.” The form should be reversed : Can the certificate go before the truth and conceal it ? I can prove the facts as I offer to prove them. On the other side—if I have rightly understood the objections made yesterday in the joint convention—on the other side, there is no suggestion that we are not right in the facts ; there is no averment that the true and lawful vote of the State of Florida was not given for the Tilden electors ; but the claim is that “ here is the certificate of Stearns, and it stands as a barrier against all these witnesses, so that the truth can

not be proven." The truth is to be buried under the certificate. Neither you, exercising for this occasion the powers of the two Houses of Congress, nor the two Houses themselves, acting separately or together, can act upon any fact whatever to the contrary of what Stearns has certified.

Let me ask, in the first place, upon what foundation this doctrine rests? Who says that you are to take that certificate as conclusive evidence against anything that can be proved on the other side? By what rule of evidence, by what precept of law, are you deprived of the right to investigate the truth? Is it not a universal rule that every judge is invested *ex necessitate* with the power to take into consideration all pertinent evidence in respect of the facts upon which his judgment is to be pronounced, unless there be some positive law declaring that certain certificates or other documentary evidence shall be conclusive? I venture to say that that is the universal rule, and that there is no court of general jurisdiction, known to American or Anglo-Saxon law, in which it is not held as a fundamental principle that, whenever a court can inquire into facts necessary to its judgment, it may take all pertinent evidence—that is to say, all evidence that tends to prove the fact—unless restricted by some express provision of law. Now, then, show me a law that makes the certificate of Stearns evidence against the truth? Where is it? In what book? It is not in the Constitution. It is not in the laws of Florida. Is it in any law of Congress? The only act of Congress applicable is that which provides that the Executive of the State shall deliver to the electors a certificate that they are such electors, but that act does not declare that this certificate shall be conclusive—neither declares it nor implies it. Suppose I offer to prove that the certificate is wholly false, fabricated for the purpose of cheating the State out of its vote and cheating the other States out of their rights also? Take the State—one of the oldest and proudest in this Union of States—the State of Massachusetts, of which my friend Mr. Commissioner Abbott is so worthy a representative, and suppose that the honored Governor of that State were so debased as to certify that the Tilden electors had received the votes of a majority of the good and true voters of Massachusetts, will any man tell me that this certificate must be taken as absolutely true; that you can not prove it to be false? Where is the law for that? Nay, more, I venture to affirm that, if an act of Congress had declared that such certificate should be

conclusive, the act would have been unconstitutional. For what reason? For this reason: The Constitution, as if the foresight of the fathers took in the conflicts of future years, declares that the person *having* the highest number of votes shall be the President, not that the person *declared to have* the highest number of votes, but "the person having the highest number." No certificate can be manufactured to take that right away. If you had declared by act of Congress, in the most positive terms, that the certificate of the Governor delivered to the electors should be conclusive against all proof, you would have transcended the limits of the organic law. You can not say that the certificate of the Governor of Massachusetts shall override the votes of the electors of Massachusetts in their choice of President.

The language of the act of Congress is not as strong as the language of the State laws generally respecting the canvass of votes. Take the case in Wisconsin, which arose in the course of a contest for the office of Governor. There a law of the State had declared that the State canvassers should determine—I think that is the language—should determine, certify, and declare who was Governor. A person came into the office of Governor upon such a certificate declaring that he was elected, and a rival claimant went into the courts with a writ of *quo warranto*, and was met there by the counsel of the incumbent with this argument: "You can not inquire, because the certificate of the State canvassers is conclusive." No, said the judges, in an opinion which does them great honor and will stand as a record of their learning, their patriotism, and their inflexible firmness, the title of Governor depends upon the votes of the people; the question is not who have certified but who have voted, and the court declared the claimant entitled, and threw out the usurping Governor.

Is not your right to inquire into the very truth implied by the law under which you act? What are you to do? You are to declare whether any and what votes are the votes provided by the Constitution, not to declare what are the votes certified by Governor Stearns. That was known well enough beforehand. You are to certify what are the lawful votes upon which a President of forty-five millions of people is to be inducted into office.

Is not the same right implied in the notion, which I find to prevail generally, that Congress might authorize a writ of *quo warranto* to try the title of President within the purview of the Constitution? Can that be doubted? The Constitution has de-

clared that the person having the highest number of votes shall be the President ; not the one certified. Congress has not as yet invested any tribunal with the power to try the title to the presidency by *quo warranto*. No such law exists, I am sorry to say. Such a law, if I might be permitted to express my opinion, ought to be made. It is no small reproach to our statesmanship that for a hundred years no statute has provided for this great exigency. I know that one eminent member of this Commission has labored assiduously to procure the passage of such a law, and of all his titles to respect I am sure that will be especially remembered hereafter.

Mr. Commissioner Bradley: "Does not the law of the District apply to the case?"

I think not, sir. I should be very glad to learn that it does. The judiciary act of 1789, as if *ex industria*, omitted to mention writs of *quo warranto*. It gave the several courts power to issue writs of mandamus and certain other writs, but not that of *quo warranto*. I know that statutes lately passed give the right to a *quo warranto* in respect of certain offices, enumerating them, arising out of the amendments to the Constitution providing for the emancipated slaves ; but I do not find any provision whatever for a writ of *quo warranto* to try the title to the office of President or presidential elector.

Of course, I speak entirely under submission to the better knowledge of the Commission. I have not been able to satisfy myself that there is any provision for a writ of *quo warranto* in the case of a President. But my argument is that, whether there be a law now existing or not, it is competent for Congress to pass such a law, and if a law to provide for a writ of *quo warranto* would be constitutional, then it is constitutional to impose a like duty on any other tribunal to investigate the title. That is to say, if you could devolve that duty upon any tribunal by means of a writ of *quo warranto*, you can devolve it by other means. If the Governor's certificate would not be conclusive there, it is not conclusive here. The right to inquire into the fact exists somewhere, and if nowhere else, it must be in you.

Thus, thinking that Congress could devolve upon some tribunal the authority to inquire into the title of the President, and that such authority would necessarily give to the tribunal investigating the right to go into the truth, notwithstanding any certificate to the falsehood, I argue that here, before this Electoral Commis-

sion, invested with all the functions of the two Houses, you can inquire into the truth, no matter what may have been certified to the contrary.

Furthermore, I submit to the Commission that there is another rule of law which necessarily leads us to answer affirmatively the question whether the truth can be given in evidence notwithstanding the certificate ; and that is that fraud vitiates all transactions, and can be inquired into in every case except possibly two. I will not contend here that the judgment of a court of record of competent jurisdiction can be impeached collaterally for fraud in the judge. Opinions differ. If it can not be impeached, it must be because such an impeachment would lead to an inquiry that would be against public policy. It would be a scandal to inquire into the bribery or corruption of a judge while the judge may be sitting to administer justice ; and, therefore, from motives of public policy, it may be the rule that until the judge is impeached and removed there can be no inquiry into the corruption of his acts. And it may also be true that the validity of an act of a Legislature can not be impeached upon the ground of fraud or bribery. But, with these two exceptions, I venture to assert that there is no statute and no precedent for declaring any act whatever beyond impeachment for fraud. Now, this canvassing board and this Governor were not invested with the immunity which invests judges of Courts of Record. They were not dispensing justice between litigant parties, and it would not be against public policy to inquire into the corruption or invalidity of their acts. Not a single consideration that I have ever heard, or which I can imagine, should lead us to the conclusion that you can not inquire into the truth of their certificates. I put it to the Commission that if they acted corruptly, if they were bribed or led astray by hunger for office, or the thirst for power, or the thirst for gold, you can impeach their acts. Who is he whose acts we are now seeking to impeach ? It is the then Governor of Florida, Stearns ; Stearns, the man who sent the telegram asking on what grounds the votes of counties could be thrown out, and who received for answer, fraud, intimidation, and something else ; Stearns, the man who controlled the canvassing board sitting to certify whether he and they were to continue in office.

Is it a true proposition that it is not lawful to inquire whether this man has acted fraudulently ? If it be true that the certifi-

cate of the Governor is conclusive evidence that the persons certified were elected, would it not follow that the certificate would be sufficient if there were no election at all? And suppose I were to prove that, in point of fact on the 7th day of November, there was no election at all in the State of Florida, that no man cast a vote, no polls were opened, no man thought of voting, would this certificate, signed "M. L. Stearns," be nevertheless unanswerable evidence that the four Hayes electors had been duly chosen?

Such, Mr. President and gentlemen of the Commission, is as brief a statement as I can make of the facts and the law as we understand them to be. The greatness of the question, having regard to the dignity of the presidential office, and the vast interests depending upon it, is as nothing compared with the moral elements involved; for true as it is that the person, upon whom your decision will confer the office for four years, will be the chief magistrate of forty-five millions of people, commander-in-chief of your army and navy, the organ between you and foreign states, the bestower of all offices, the executor of your laws, these are as nothing compared with the greater question whether or not the American people stand powerless before a gigantic fraud. Here is the certificate; one feels reluctant to touch it. Hold it up to the light. It is black with crime. Pass it round; let every eye see it; and then tell us whether it is fit to bestow power and create dignity against the will of the people. One of the greatest poets of the palmy days of English literature, writing of the coming of our Saviour, has said:

"And ancient Fraud shall fail,  
Returning Justice lift aloft her scale."

Ancient fraud! When was there ever fraud like this? In previous ages fraud has succeeded only because it has been supported by the sword, and protesting peoples have been powerless before armed battalions. Never yet in the history of the world has a fraud succeeded against the conscience and the will of a self-governing people. If it succeeds now, let us bow our heads for shame; let us take down from the dome of the Capitol the statue which every morning faces the coming light; let us clothe ourselves with sackcloth and sit in ashes forever.

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## MOVING THE HOUSE TO DISAGREE WITH THE COMMISSION.

On Friday, the 9th of February, by the votes of eight to seven (the eight being three judges of the Supreme Court, three Senators, and two Representatives, the seven being two judges of the Supreme Court, two Senators, and three Representatives), the commission decided that the votes of Frederick C. Humphreys, Charles H. Pearce, William H. Holden, and Thomas W. Long, Hayes electors, were the votes provided for by the Constitution, and were to be counted as four votes for Rutherford B. Hayes as President and William A. Wheeler as Vice-President.

This decision being the next day communicated to the joint meeting of the two Houses, Mr. Field submitted objections. The Houses then separated, to consider the objections, and in the Representatives he moved this resolution :

"*Ordered*, That the counting of the electoral votes from the State of Florida shall not proceed in conformity with the decision of the Electoral Commission, but that the votes of Wilkinson Call, James E. Yonge, Robert B. Hilton, and Robert Bullock, be counted as the votes from the State of Florida for President and Vice-President of the United States."

Upon this, he addressed the House as follows :

MR. SPEAKER: Scarcely had the election taken place in November, when the President invited representatives of the Republican party to visit the disputed States of the South for the purpose of witnessing the canvass of the votes, declaring, as he did so, that no President could afford to be elected by fraud. When Congress met in December, acting in the same spirit, it sent committees of investigation into the same States to ascertain the truth. These States have been ransacked, hosts of witnesses have been examined, and piles of evidence have been laid upon our tables. Now, of a sudden, it is discovered that the invitation of the President was an act of superfluous folly, and that his messengers and the committees of the two Houses went on a fool's errand.

This discovery is made by Republicans. There is not a Democrat in either House of Congress who does not disown and reject it. It is now to be seen whether Republicans here reject or accept it. We shall soon know whether the Republican party has so far forgotten the brave words and heroic deeds of its earlier days as to cry, "Evil, be thou my good," and seek to install a falsehood in the chief magistracy of the land.

The Electoral Commission which you have constituted to solve the doubts and relieve the consciences of the people has gravely resolved, first, that no evidence can be received beyond the certificates and papers submitted to the two Houses by the President of the Senate ; and, secondly, that of these certificates and

papers none can be considered which bears record of any act done after the casting of the votes by the electors. This decision means nothing less than that the certificate of the Governor of the State, in accordance with the determination of the State canvassers, is conclusive, unless before the electoral vote is cast the State rectifies the certificate. The qualification, I was about to say, is a mockery. We know that there is scarcely a State in the Union where the canvass is completed until within a few days of the meeting of the electors. We know, moreover, that in this State of Florida the canvassers completed their canvass at three o'clock in the morning, and that the electors voted at twelve o'clock of the same day. Upon the theory of the commission, unless the State of Florida, within those nine hours, acting through its various departments, aroused itself and rejected the determination of the canvassing board, there is no power to reject it in the State or in Congress. The doctrine of the commission, if I interpret it aright, amounts to this : That if the general commanding in Florida had upon the morning of the 6th of December marched a corporal's guard into the State-House, told off four of his soldiers, and forced the State canvassers to certify to their election, and the Governor to superadd his certificate, there would have been no power in the land to prevent the votes of these soldiers from being counted as the electoral votes of Florida. We are now called upon to declare whether in the solemn judgment of this House such is the law of the land.

Let me show you some of its consequences. We offered to prove fraud ; we were denied the right to do so. We offered to show that the pretended appointment of the Hayes electors was corruptly made. This was refused. But the truth can not all be concealed. One of the persons certified by the commission to be a lawful elector of the State of Florida is Charles H. Pearce. There is a record of him in the reports of the Supreme Court of the State which shows him to be a convicted felon. In the fourteenth volume of these reports I find the case of the State of Florida against Pearce. The indictment set forth that Charles H. Pearce, colored, a minister of the gospel and a Senator representing the eighth district in the Senate of the State of Florida, on the 4th of February, 1870, during the pendency before the House of Assembly of a resolution to impeach the Governor of high crimes and misdemeanors with the intent of feloniously influencing the vote of a member, offered and promised him \$500.



He was convicted by a jury, and, upon his appeal to the Supreme Court of the State, the judgment and sentence were affirmed. That man, a pardoned convict, gave the one vote which will elect Mr. Hayes, if elected at all, to the presidential office.

Mr. Speaker, the decision of this commission, as I view it, is entitled to no respect. It is as unsound in morals as it is unfounded in law and mischievous in its consequences. The spectacle of successful villainy is corrupting in proportion to the extent of the theatre on which it is displayed and the prizes which it wins. The prize of the presidency has never yet been won by fraud. If it is thus won now, the spectacle will be more injurious to our good name and more corrupting to our people than all the peculation, robbery, and frauds of all our history.

The resolution was adopted by the House, yeas 168, nays 108, not voting 69. Mr. Field then submitted the following, which was adopted: "Ordered that the Clerk inform the Senate of the action of this House, and that the House is now ready to meet the Senate in this Hall." When the Senate came in, the following proceedings took place:

The Presiding Officer: "The joint meeting of Congress resumes its session. The two Houses separately have considered and determined the objections submitted by the member from the State of New York (Mr. Field) to the decision of the commission upon the certificates from the State of Florida. The Secretary of the Senate will now read the decision of the Senate."

The Secretary of the Senate read the following:

"*Resolved*, That the decision of the commission upon the electoral vote of the State of Florida stand as the judgment of the Senate, the objections made thereto to the contrary notwithstanding."

The Presiding Officer: "The Clerk of the House will now read the decision of the House."

The Clerk read as follows:

"*Ordered*, That the counting of the electoral votes from the State of Florida shall not proceed in conformity with the decision of the Electoral Commission; but that the votes of Wilkinson Call, James E. Yonge, Robert B. Hilton, and Robert Bullock be counted as the votes from the State of Florida for President and Vice-President of the United States."

The Presiding Officer: "The two Houses not concurring in ordering otherwise, the decision of the commission will stand unreversed, and the counting will now proceed in conformity with the decision of the commission. The tellers will announce the vote of the State of Florida."

The votes were then cast: four for Mr. Hayes, as President, and Mr. Wheeler, as Vice-President.

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## VACANCY IN THE PRESIDENTIAL OFFICE.

Section 146 of the Revised Statutes of the United States is as follows:

"In case of removal, death, resignation, or inability of both the President and Vice-President of the United States, the President of the Senate, or, if there is none, then the Speaker of the House of Representatives, for the time being, shall act as President until the disability is removed or a President elected."

On the 27th of February, by direction of the select committee on the powers, privileges, and duties of the House of Representatives, in the counting of electoral votes, Mr. Field reported the following bill to amend section 146 of the Revised Statutes:

*Be it enacted, etc.*, That section 146 of the Revised Statutes be and the same is hereby amended so as to read as follows:

"SECTION 146. In case of removal, death, resignation, or inability of both the President and Vice-President of the United States, or in case of a vacancy in these offices arising from the failure of the two Houses of Congress to ascertain and declare an election before the commencement of the term of office in respect to which the electoral votes were cast, or in case of a vacancy arising from any other cause, the President of the Senate, or, if there be none, then the Speaker of the House of Representatives for the time being, and if there be no such Speaker, then the Secretary of State in office when the vacancy happens, shall act as President, until the disability is removed or a President elected."

And in support of the bill Mr. Field spoke as follows:

THE proposition in this bill is to amend section 146 of the Revised Statutes. In order to determine whether this is expedient, we must first look at the existing law, and then see how this bill will alter it. The present section of the Revised Statutes provides only for the removal, death, resignation, or inability of incumbents of the offices. There may be occasions when there are no incumbents, and this amendment is chiefly for the purpose of supplying that defect. It ought to have been made long ago; and, if it had been in the statutes at the beginning of this session, a good deal of the uncertainty, the disquiet, and the alarm of the community would have been avoided; for the difficulty, Mr. Speaker, has been from the beginning that the people of this country thought that, if the two Houses disagreed in the count, anarchy would follow; whereas, if you had made the provision by law, which I ask you now to make, the office of President, with its great powers, would have passed easily and harmlessly into the hands of an administrator for the time being. It is not merely the present exigency for which the bill is offered; and so I beg gentlemen to consider that it is put to them not as a partisan measure but as a measure of policy, commended to them as they

desire, which I am sure they do, the best good of their country. Suppose an invasion or a civil war, which prevents a count of the electoral vote at the time required by law, what, then, would happen? As the statute now stands, there is no officer to exercise the presidential office *ad interim*. And if, after the declaration of an election of President and Vice-President, both should die—it might so happen—a remote contingency, I admit—but if, after the declaration this afternoon or to-morrow of the President and Vice-President elect, they should both be traveling in the same railway-train and lose their lives, as the law now stands there is no provision for the vacancy. Are you willing to leave the law in this condition?

Then, if it be expedient, is there power in the law-making department of the Government to supply this defect? I insist that there is, for the reason that, wherever the Constitution itself does not carry into effect its general provisions, it is the duty of the legislative department to carry them out by legislation, and to that end was provided that clause of the Constitution which gives power expressly to Congress to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.” The power is granted by the Constitution to elect a President. This power is lodged somewhere. It is, in fact, partitioned among different authorities—a part in the electors and a part in the two Houses when they count the votes. But the power exists; and I submit that it is not only our right, but our duty as guardians of the public tranquillity and the rights of all citizens and all authorities, to provide for every emergency. In that spirit I offer this bill. I repeat that it is not offered as a partisan measure. I am sure that there is no desire to do anything, but to abide faithfully by the law of the land as it now stands upon the statute-book, including the law that we made a few days ago; but that does not prevent us from taking advantage of an occasion which suggests the need of an amendment, and for that reason I propose this amendment of the statute.

A debate then occurred. Mr. Field replied as follows:

There is not time in five minutes to reply to all these arguments, and I will select therefore those which are most prominent. To my friend from Massachusetts (Mr. Banks), the friend of

many years, let me say that he entirely mistakes the object and effect of this bill. He tells us that it is the duty of the two Houses to count the votes. So it is their duty ; but what did we hear on the first Monday of December ? We heard gentlemen at this end of the Capitol declaring that no vote should be counted unless both Houses concurred, and at the other end that the vote should be counted as the President of the Senate directed, and, if it had not been for the electoral law passed for the purpose, no announcement could have been made of the votes in case of disagreement of the two Houses. That was a contingency then threatening us all, not provided for by the law, an omission for which my friend is in part responsible, as he has held an honored seat in this House for many years, and has never attempted to provide for the contingency.

Mr. Banks, interrupting, "There was no necessity for it." Mr. Field continued :

Now that we have a necessity, let us act like statesmen and provide for it. The gentleman from Ohio thinks that the bill is constitutional ; the gentleman from Iowa thinks it is not. I have submitted the reasons for which I think it is constitutional. They are these : Congress has the power to make all laws necessary or proper for carrying into effect any power vested by the Constitution in the Government of the United States. Of all the powers granted, except the legislative, that of making a President is the highest. That power may be entirely defeated, as the law now stands, by a number of contingencies easily imagined. To provide for them I ask that we pass this bill, and I appeal to my friends on the other side of the House to come forward, in the spirit of statesmen, laying aside the spirit of partisanship, and help us pass it. Gentlemen tell us that it applies to the present election. It does apply to this and to all elections, as it should. That is the reason why I ask its passage, and I now call for a vote.

The bill was then passed by the House—yeas 140, nays 109, not voting 91.

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REMEDY FOR A WRONGFUL INTRUSION INTO THE OFFICE OF PRESIDENT OR VICE-PRESIDENT.

On the 2d of March, by direction of the same committee on the powers, privileges, and duties of the House, Mr. Field reported a bill to provide a remedy for a wrongful intrusion into the office of President or Vice-President, on which he spoke as follows :

MR. SPEAKER : The provisions of this bill are extremely simple. It provides that the title of President may be determined by an action in the nature of a *quo warranto* in any circuit court of the United States. In respect of the tribunal to take the jurisdiction, it follows the precedent of the act passed by Congress some years ago, authorizing a suit in respect of the Union Pacific Railway and Crédit Mobilier Company, to be brought in any circuit court. This bill authorizes a trial in any part of the country which the court may designate as most convenient for witnesses and parties, and it provides that the court shall go to the very root of the matter by inquiring whether the votes sent from a State are the true electoral votes of that State. The object is to get at the truth, and to test the validity of votes that purport to come from a State. The bill authorizes the court to inquire whether there be in these votes any falsehood or any invalidity, and whether the person appointed elector was ineligible when he was appointed or incapacitated when he cast his vote ; and provides that all votes of persons ineligible when appearing to be elected or incapacitated when voting shall be rejected. The court is authorized further to inquire into any fact necessary to determine the rights of the parties. The trial is to be begun within ninety days from the commencement of the suit, and upon the decision there is to be no execution of the judgment if either party appeals to the Supreme Court within ten days, and that court, if not in session, is to be immediately convened. Its decision is to be executed.

These are the provisions of the bill. Is it expedient that it should pass ? The first question, of course, is whether the bill is constitutional. That is to say, is it constitutional to vest in any court of the United States the right to try the title to the presidency ? In respect of that, I have only to answer that the Constitution declares that the judicial power shall extend to all cases arising under this Constitution or the laws of the United

States. Is not a disputed title to the presidency a case arising under the Constitution or the laws? Most unquestionably it is. Congress has already determined as much, because there now stands upon the statute-book authority for a *quo warranto*—and, for aught I see, a *quo warranto* to try the title to the presidency—in cases arising under the fourteenth amendment. This is the language :

“Jurisdiction is given to the circuit courts of all suits to recover possession of any office except that of elector of President and Vice-President, or Representative or Delegate in Congress, or member of a State Legislature, where the sole question arises out of the denial of the right to vote on account of race, color, or previous condition of servitude.”

In short, I think there can be no question that the proposed bill is constitutional. Then, is it expedient? This is a question which gentlemen on this floor can determine from their own observation. There are but two alternatives—a trial by law or a trial by force. And you know from what you have seen, that but for the electoral statute we might have had a conflict here this very month. The two Houses of Congress are diametrically opposed to each other upon the question whether they both must agree to count particular votes or both must agree to reject them. You can not solve that question except by legislation. The Anglo-Saxon mode, the mode which makes the Anglo-Saxon races the superior of the Latin races, and will always make them so, is, that when they have an internal question to solve they prefer to try it by the arbitrament of reason rather than the arbitrament of force.

Therefore, I insist that this bill is not only constitutional, but that it is expedient and of the very highest expediency. In the present emergency, I appeal to gentlemen on the other side of the House. You have a President counted in whose just claim to the office is disputed. I make no imputations against any one in regard to this matter. But there is a question about the title of the incoming President. You know that there is a question, and you can best satisfy the conscience and relieve the doubts of the country by allowing that question to be settled as other questions in dispute are settled. Give us this bill, and you have conciliation for the present and safety for the future.

After other speeches, the last of which was by Mr. Townsend, of New York, Mr. Field replied as follows :

To all that part of the gentleman's remarks which may be deemed personal, I have not a word of reply. I thought that he, whom I have known so many years, knew me better. I will show him, however, that he displays in his argument more zeal than discretion. He says that there never was a judicial trial for the chief magistracy anywhere in the world. Will he tell me where the chief magistrate is elective except in this country?

Then the gentleman tells us that the person who is counted in is the rightful President. Does not the Constitution carefully abstain from declaring that the count makes the title? This is its language: "The person having the highest number of votes shall be the President." He has the right to the presidency under the Constitution, whether the two Houses of Congress count him in or not. The gentleman should not have forgotten this.

Then, again, we are told that the mere idea of having the title to such an office tried in the courts is new.

Mr. Townsend, of New York: "I did not say so. I spoke of a *quo warranto* at the instance of an individual. . . ."

Mr. Field: But the electoral statute contains the following:

"That nothing in this act shall be held to impair or affect any right now existing under the Constitution and laws to question the right or title of the person who shall be declared elected, or who shall claim to be President or Vice-President of the United States, if any such right exists."

What does this mean? Did the framers of the bill intend to delude us? Did they hint that there was a remedy when there was none?

It is disputed whether there is at present a remedy or not. Mr. Justice Bradley, when I was arguing before the commission, intimated that there might be a remedy under an old law of Maryland, still in force in this District; and Mr. Carpenter, in his argument, insisted that under a provision of our statutes which he drew the writ might be issued. But I answer to these suggestions that, if the writ be issued under those laws, supposing it to be issued at all, it must be in the name of the United States, and the proceeding must be conducted by the Attorney-General. Do you imagine that an Attorney-General appointed by the incumbent of the office will willingly carry on a lawsuit to oust his superior? The bill which I offer provides that the prosecution

shall be under the direction of the claimant, as it ought to be. I think I have now answered all the objections but the one urged by my friend from Ohio [Mr. Lawrence]. If I understood him aright, he was in favor of providing by law for the determination of the question in the courts. But he asked, "Would you require a vote given by an ineligible person to be rejected?" Most certainly I would, for I insist upon obedience to the Constitution always, and when it declares that no person holding an office under the United States shall be appointed an elector, I think that such an appointment should be treated as void. I regard as simply monstrous, the decision of the commission that, although the great charter of our Union, the highest authority in the land, declares that no person holding an office of profit or trust under the United States shall be appointed an elector, yet he may, nevertheless, be appointed an elector, and his vote may make a President. The gentleman whom you are about to inaugurate will hold his office by no higher title than the votes of men who are declared by the fundamental law to be incapable of exercising the functions of electors.

The bill was lost—ayes 68, nays 99, not voting 125.

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ARMY APPROPRIATION BILL, MARCH 3, 1877; SPEECH  
AGAINST THE USE OF THE ARMY IN CONTESTS FOR  
STATE OFFICES.

The House resumed the consideration of the report of the committee of conference on the army appropriation bill.

Mr. Atkins: I yield five minutes to the gentleman from New York.

MR. FIELD: Mr. Speaker, this is a question of principle. We have now arrived at the supreme moment when this House must show whether or not it will exercise its constitutional rights. To gentlemen of the South I say, Now is your time to stand up; for, if you do, your friends can say to you, "Lift up your heads, for your redemption draweth nigh."

Is this the time to give way, when our political opponents are about to set a falsehood in the forehead of this nation? No. It is our right to insist upon this provision. The constitutional argument against it is utterly untenable. The Constitution pro-



vides that "the United States," not the President, "shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the Legislature, or of the Executive when the Legislature can not be convened, against domestic violence." Do gentlemen believe that the President is the one to exercise this power? I would ask my friend from Massachusetts [Mr. Banks] whether he thinks that the President can march an army into Massachusetts, and, declaring that it has not a republican form of government, take therefore control of the State? If he can not, then we have a right to insist upon this proviso, because the two cases are in the same category. The President has no more right under the Constitution, without legislation by Congress, to interfere with the administration of a State government, or to decide which is the rightfully chosen Governor, than he has to decide whether a State has a republican form of government.

Why, sir, gentlemen forget the constitutional history of this country. The Government was established under the Constitution in 1789, and no law to permit the President to interfere in cases of domestic violence was passed until 1795. President Washington went on for six years without the power. The law of 1795 was passed, if I mistake not, in consequence of the whisky insurrection in Pennsylvania. The power was then given to President Washington so far as to use the militia; the power to use the army was not given till years afterward. If no such power was granted to the President during the first six years of the Government, can we not take it away now?

We ought to take it away. What do we see? We see State governments set up and pulled down by our soldiers. We see (for it is idle to attempt concealment of the truth), we see the army used to put down one party and to put up another. We have seen the army used to elect a President. Everybody knows—in this hall, at least, there is not a man so blind as not to see—that but for the use of Federal troops in Florida and Louisiana you would not have the inauguration of the President who is to take the oath in an hour and a half from now.

Mr. Speaker, I appeal again to every member on this side of the House to stamp his condemnation once for all upon the monstrous doctrine that the President can use your army as he pleases. It is your right, not his, to make rules for its government. We hold the purse-strings; control of them was given to

us for this very purpose. Else why the provision that no appropriation for the army shall be for a longer term than two years? No act of Congress can be passed that shall tie up the hands of this House.

Let us stand firm. [Here a flash of sunlight passed over the ceiling.] Behold, the light cometh! I accept the auspicious omen. Let us stand immovable. The responsibility of an extra session will not rest with us. If the Senate choose to say to this House, "The army bill shall not be passed unless you give the President power to keep Packard and Chamberlain in office," then let us answer back, "Take that responsibility, if you dare!"

A new conference committee was appointed, from which the following report was soon made:

Mr. Morrison: "I desire to report from the committee of conference on the army appropriation bill that they have been unable to agree. There were several subjects on which they disagreed, but all might have been accommodated but one, and that the subject embraced in the fifth section of the bill, which relates to the use of the army in Louisiana and South Carolina. That the House may know exactly the position of the House conferees, I have written down the substance of what they insisted on, and ask that it be read by the Clerk."

The Clerk read as follows:

"The conferees on the part of the House, while not insisting on the letter of the fifth section of the army bill, firmly maintain they will consent to the passage of no army appropriation bill that shall not contain such restriction upon the President in regard to the use of the United States troops in Louisiana as will prevent him from installing and maintaining the Packard government."

## CABLE ANNIVERSARY.

Remarks at a reception given by Mr. Cyrus W. Field, on the 10th of March, 1879, on the twenty-fifth anniversary of the organization of the first company ever formed for laying an ocean-cable. The host made a short address of welcome, and, at its close, turned to his brother, saying that he, "as the counsel and adviser of the company through all these years, had had occasion to speak for it many times and in many places," and requested him to add a few remarks. The latter responded to the request as follows :

"THEN" and "now" are the words which best indicate the current of thought of one who was an actor in the transaction we are commemorating and the events which followed it. Then, as we have been told, there was not a submarine telegraph in the world, excepting three from England to the adjacent Continent, none of which lay more than fifty fathoms deep ; now, there are cables at the bottom of every ocean, except the Pacific. Then, whatever took place in Ireland, the nearest land, could be known to us only after eight or ten days ; now, we read at our breakfast-tables news of what has happened a few hours before in Ireland and in England, in France and Spain, in Constantinople and Cairo, in Delhi and Melbourne. When I look at this ceiling and these walls, all unchanged, and think of the group, small in number but great in heart, that then gathered around this table, and of what they set on foot, I feel that the achievements of our days have surpassed the marvels of fable and romance. Peter Cooper has written his name on walls of stone and iron ; Moses Taylor has heaped up "riches and honor" ; Marshall O. Roberts has plowed either ocean with his swift ships ; and yet nothing that these men have done has wrought half so much for the world as that which they began that night. The part which my brother took you all know. Of the other two, one, Mr. Chandler White, my friend of many years, fell by the wayside, long before the end of the tedious journey which the others had before them. Mr. Wilson G. Hunt took his place, and journeyed with them resolutely to the end. No one knows better than I the obstacles which these gentlemen had to overcome, the disappointments to suffer, the delays to sustain, the obloquy to withstand ; and no one can

bear stronger testimony than I can to their patience, their perseverance, their courage, and the deserved honor of their final triumph. The flag, American and English wrought into one, which hangs over these windows, is the sign of their constancy in defeat, as of their victory. That united flag floated at the mast-head of the Niagara in the disastrous expedition of 1857, and the partially successful one of 1858; it was run up again at the fore of the Great Eastern, for the voyage, when she failed in 1865; and was kept streaming in the wind, until it floated over a victorious ship and a great work accomplished.

Though we then knew something of what we were doing, we did not know all. Events have outrun the imagination. Little did I dream that, within twenty years, I should stand beneath the Southern Cross and send from Australasia a message to my northern home, which, almost while I stood, passed over half the globe, darting with the speed of thought across the nearly two thousand miles of Australian desert, through the Arafura Sea, past the "Isles of Ternate and Tidore," across the Bay of Bengal and the Sea of Arabia, along the Red Sea coast, under the Mediterranean and Biscay's sleepless bay, and finally beneath our own Atlantic to this island city, "situate at the entry of the sea."

Seeing that so much has been accomplished in the quarter-century past, what may we not expect in the quarter-century to come? The completion of the world-encircling girdle, by forging the remaining link between the Occident and the Orient, is but a part of what you may witness. There will be new instruments for handling the electric current, as there are new places to reach. Then, when every part of the earth shall be visited each day by the electric spark, with its messages from the peoples of many lands, we may hope to see that better understanding among all the sons of men which is sure to teach them that the ways of peace are the ways of prosperity and honor.

**ARGUMENT BEFORE THE SUPREME COURT OF  
THE UNITED STATES, ON BEHALF OF THE  
STATE OF NEW YORK, IN THE CASE OF THIS  
STATE AGAINST THE STATE OF LOUISIANA  
AND OTHERS, APRIL, 1882.**

**IF THE COURT PLEASE :**

This cause has already occupied so much time, and so many topics have been gone into, and so little time remains to me, that I shall be obliged to pass rapidly over some parts of the case, which I would have gladly discussed more fully.

The first point to be considered is the nature and scope of this suit of the State of New York which I am advocating. They are to be gathered from the record, from which I desire to show you what is the primary and what is the secondary object. You will find on pages 3 and 4, after a statement of the statute of Louisiana and the corresponding provisions of the Constitution of that State, this allegation respecting the consolidated bonds of the State: That such consolidated bonds were duly executed and issued to the amount of twelve millions of dollars, or thereabout, many of which were issued to citizens of New York, who now hold them to the amount of hundreds of thousands of dollars. Another allegation is that the plaintiff is, moreover, the owner and holder of coupons from some of these bonds. Then it is shown that Louisiana has repudiated in effect both bonds and coupons. The relief sought is a judgment, that the bonds with the coupons and the statute and Constitution constituted a valid contract between the State of Louisiana and the holders which can not be impaired by any act of the State, that the defendants be enjoined from diverting designated funds to other purposes, and that the coupons held by New York and the bonds held by her citizens be paid as they become due.

You will perceive, then, that the State of New York comes here, not merely or chiefly as the assignee of a certain number of coupons, but as sovereign and trustee for her five millions of

people, many of whom have bought in her markets and now hold the obligations of the State of Louisiana, which they took upon the faith of that State. The transfer of the coupons is a mere incident of the case.

The cause is one in which New York comes to assert her claims under the law of nations, in the form provided by the Constitution of the land. It is for you to determine whether, under this Constitution, New York can assert the rights which, under the old law, she had, and which she avers that she has never lost.

Who are the persons for whom she intervenes?

Mr. CAMPBELL : Speculators.

Mr. FIELD : Speculators ! Bloated bondholders, I expected to hear, for that is usually the language of defaulters and repudiators, who have seduced capitalists into lending them money.

The first witness examined on behalf of New York was Mr. Justice Rapallo, an eminent judge of our Court of Appeals, who invested \$25,000 in the bonds of this State of Louisiana. There are other holders—banks—that were induced to lend money on the pledge of the bonds, and have been obliged to hold them for years. This citizen and judge, with other citizens, and this bank with other banks, not speculators but investors or pledgees, ask New York, which created the corporations and which protects her corporations and citizens alike, to intervene on their behalf, and as their guardian, trustee, and sovereign, to come into this court and make the claim which can be made nowhere else, and which, if lost here, is lost forever.

What are these obligations of Louisiana? Promises to pay, made with all the deliberation and solemnity with which a sovereign State can pledge her faith and bind her honor. Whether it was to feed hungering and plundering political adventurers, or to defray the expenses of public improvements, real or fancied, the State had previous to 1874 contracted—or, at least, there was contracted in her name and apparently by her authority—a large debt, amounting to \$18,000,000. This debt she undertook to compromise. She published in the markets of New York and London, of Paris and Amsterdam, this proposal: If you will surrender your present claims, we will give you new bonds for 60 per cent of their face, payable in forty years, bearing interest at 7 per cent, and these bonds we will fortify with all the safeguards that ingenuity can devise. We will provide machinery

for levying a tax of five and a half mills on the dollar, sufficient for the payment of the bonds, principal and interest, and we will designate the officers who are to collect the tax and pay the bonds. So enacted the Legislative Assembly.

This was not all. The people of Louisiana in their sovereign capacity adopted a constitutional ordinance ratifying the statute, and declaring that the issue of these consolidated bonds created a valid contract between the State and every holder of the bonds, which the State should "by no means and in no wise impair"; that no court should enjoin the payment of the principal or interest or the levy or collection of the tax, and that, to secure such levy, collection, and payment, the judicial power should be exercised when necessary.

This compromise proposed by Louisiana to her creditors was accepted by them, and 40 per cent of her debt was extinguished. What then happened? What could have been expected to happen? Why, that the people of the State, grateful for the lightening of their burden by nearly half, and pleased with the confidence reposed in their honor, went on to keep their promises! Not at all.

Within five years, almost before the ink was dry upon some of these bonds, they adopted another constitutional ordinance, which proposed to *remit* the interest due the 1st of January, 1880, and to provide that for five years thereafter the State should pay interest at 2 per cent, for three years afterward at 3 per cent, and for all the years following at 4 per cent; or the debtors might, if they liked it better, take instead new bonds for seventy-five cents on the dollar, with interest at 4 per cent—forgetting that the new bonds would be no better than the old, and that, if the faith of Louisiana was not already bound, it never could be bound. Here was the *culmination* of repudiation—*culmination* I say, because never before in this land has there been repudiation like it. In Mississippi the pretense was that bonds had been fraudulently issued; in Minnesota, some other pretense; in Tennessee the same; and in Virginia the same; but that which was done in Louisiana was done without a pretense of taint in the existing obligations; it was done in a time of profound peace, without stress of poverty, without any excuse whatever.

If poverty had been the reason, the State would have said, "We will pay as much as we can at present, and the balance shall be paid at a future time." But the State is able to pay.

Situate upon the banks of the Mississippi, at the entry of the sea, Louisiana might count upon a future such as few States of this Union could dream of. She holds both sides of the magnificent river, the sources of which lie in that broad valley of abundance whose harvests surpass the harvests of the Nile. She has but to preserve her honor, and riches will come with honor.

The questions which are presented upon these pleadings and this evidence divide themselves naturally into five : First, Does your jurisdiction between States extend to money demands ? Second, Does it extend to money demands assigned for the purpose of prosecution ? Third, If there be no assignment, can a State as a sovereign assert in this court the rights which she would have had under the law of nations, if she had not come into the federal bond, and under that law could New York, as an independent State, have intervened for the enforcement of the claims of her citizens against Louisiana ? Fourth and fifth, If we are wrong in the arguments which we make upon the three previous questions, can officers of the State, and funds in their hands, be reached, so as to compel the specific performance of the stipulations contained in the Constitution and statute of Louisiana ?

THE JURISDICTION OF THIS COURT OVER CONTROVERSIES BETWEEN THE STATES, AS ESTABLISHED BY THE CONSTITUTION, EXTENDS TO EVERY CONTROVERSY, WHICH ONE STATE CAN HAVE WITH ANOTHER.

In *Cohens vs. Virginia*, 6 Wheaton, 264, Chief-Justice Marshall said, speaking of the judiciary article :

*"In the second class the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and citizens of another State,' 'and between a State and foreign states, citizens, or subjects.' If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."*

The word "controversies" is used several times in the judiciary article, and there is no reason to suppose that it is used in different senses. Whenever it has been interpreted by the courts, one signification, and one only, has been given to it. On some



occasions it has been said that the word does not include questions that are purely political, but that is because a judiciary, by its nature, entertains only judicial questions. A political question belongs to the political department of the Government, as a judicial question to the judicial department. For example, the Circuit Courts have cognizance of suits by one citizen against another upon private contracts of every kind, whether for the price of land or chattels, or upon negotiable paper; but if in such suits political questions arise, the court adopts as its rule the determination of the political department, reserving to itself every question that is in its nature judicial. See the observations of Chief-Justice Marshall, in *Brown vs. The United States*, 8 Cranch., 110, and of Chief-Justice Taney, in his dissenting opinion in *Rhode Island vs. Massachusetts*, 12 Pet., 752.

A money demand may present, and generally does present, a purely judicial question. Most controversies, indeed, resolve themselves into demands for compensation in money. We can imagine many cases of claims for money which might be made by one State upon another. A suit could be maintained in this court by Virginia to compel West Virginia to pay her proportion of the debt contracted before the separation. There may be demands for causes other than contract—demands for injuries. The States are not prohibited from engaging in trade. They may own and keep trading-ships; and if New York, for the purpose of revenue, should establish a merchant-fleet, and one of her vessels, going to New Orleans, should be seized by the authorities of Louisiana and sold, and the money paid into her Treasury, it could hardly be pretended that, though the individuals who made the seizure might be prosecuted for the wrong, the State of Louisiana could not be made to answer New York in this court for the proceeds of the confiscated property.

These are the conclusions to which we should come independently of judicial construction. We have, however, such a construction by this court, given when the Constitution was fresh from the hands of its framers. The case of *Chisholm* against Georgia gave an interpretation to the Constitution which must be accepted as of unquestionable authority. No matter what Hamilton had previously said in "*The Federalist*," no matter what Madison had said in the Convention, the judgment in *Chisholm's* case, from the time it was delivered, became the rule

of this court, and the law of the country. It stands now as firm as it stood when rendered. It has been respected and recognized as authority whenever it has been mentioned, in the debates of lawyers or the judgments of courts.

In the case of *New Jersey vs. New York*, 5th Peters, 287, Chief-Justice Marshall said :

"At the same term, the case of *Chisholm's Executors vs. The State of Georgia* came on, and was argued for the plaintiffs by the then Attorney-General, Mr. Randolph. The judges delivered their opinions *seriatim*; and those opinions bear ample testimony to the profound consideration they had bestowed on every question arising in the case. Mr. Chief-Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson, and Mr. Justice Blair decided in favor of the jurisdiction of the court, and that the process served on the Governor and Attorney-General of the State was sufficient. Mr. Justice Iredell thought an act of Congress necessary to enable the court to exercise its jurisdiction."

And afterward, in *Kentucky vs. Dennison*, 24 How., 96, Mr. Chief-Justice Taney used these words :

"The court is sensible of the importance of this case, and of the great interest and gravity of the questions involved in it, and which have been raised and fully argued at the bar.

"Some of them, however, are not now for the first time brought to the attention of this court; and *the objection made to the jurisdiction*, and the form and nature of the process to be issued, and upon whom it is to be served, *have all been heretofore considered and decided, and can not now be regarded as open to further dispute.*

"As early as 1792, in the case of *Georgia vs. Brailsford*, the court exercised the original jurisdiction conferred by the Constitution, without any further legislation by Congress, to regulate it, than the act of 1789. And no question was then made, nor any doubt then expressed, as to the authority of the court. The same power was again exercised without objection in the case of *Oswald vs. The State of Georgia*, in which the court regulated the form and nature of the process against the State, and directed it to be served on the Governor and Attorney-General.

"But, in the case of *Chisholm's Executors vs. The State of Georgia*, at February Term, 1798, reported in 2 Dall., 419, the authority of the court in this respect was questioned, and brought to its attention in the argument of counsel; and the report shows how carefully and thoroughly the subject was considered. Each of the judges delivered a separate opinion, in which these questions as to the jurisdiction of the court, and the mode of exercising it, are elaborately examined.

"Mr. Chief-Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson, and

Mr. Justice Blair decided in favor of the jurisdiction, and held that process served on the Governor and Attorney-General was sufficient. Mr. Justice Iredell differed, and thought that further legislation by Congress was necessary to give the jurisdiction, and regulate the manner in which it should be exercised. *But the opinion of the majority of the court upon these points has always been since followed.* And, in the case of *New Jersey vs. New York*, in 1831, 5 Pet., 284, Chief-Justice Marshall, in delivering the opinion of the court, refers to the case of *Chisholm vs. The State of Georgia*, and to the opinions there delivered, and the judgment pronounced, in terms of high respect, and after enumerating the various cases in which that decision had been acted on, reaffirms it in the following words: "

In the case of *Rhode Island vs. Massachusetts*, reported in 12 Peters, upon a motion to dismiss the bill for want of jurisdiction, the question of jurisdiction over controversies between States was again gone into. The following are extracts from the elaborate opinion of the court, as delivered by Mr. Justice Baldwin.

On page 719 he says :

"Before we can proceed in this cause, we must, therefore, inquire whether we can hear and determine the matters in controversy between the parties, who are *two States of this Union, sovereign within their respective boundaries, save that portion of power which they have granted to the Federal Government, and foreign to each other, for all but federal purposes.* So they have been considered by this court through a long series of years and cases, to the present term; during which, in the case of the *Bank of the United States vs. Daniels*, this court has declared this to be a fundamental principle of the Constitution; and so we shall consider it in deciding on the present motion."

And again, on page 721 :

"That it is a controversy between two States can not be denied; and, *though the Constitution does not in terms extend the judicial power to all controversies between two or more States, yet it in terms excludes none, whatever may be their nature or subject.*"

Again, on page 727 :

"By the ninth article of confederation, adopted by the Legislatures of the several States, it is provided: 'That the United States in Congress assembled shall also be the last resort on appeal, in all disputes and differences now subsisting, or which may hereafter arise between two or more States concerning boundary, jurisdiction, or *any other cause whatever.* . . . That *the Constitution*, which emanated directly from the people, in con-

ventions in the several States, *could not have been intended to give to the judicial power a less extended jurisdiction*, or less efficient means of final action, than the articles of confederation, adopted by the mere legislative power of the States, had given to a special tribunal appointed by Congress, whose members were the mere creatures and representatives of State Legislatures, appointed by them without any action by the people of the State."

Again, at page 731 :

"There is but one power in this Union paramount to that by which, in our opinion, this jurisdiction has been granted, and must be brought into action if it can ; that power has been exerted in the eleventh amendment ; but while it took from this court all jurisdiction, past, present, and future, of all *controversies between States and individuals*, it left its exercise over those *between States as free as it had been before.*"

And it may be well in this connection to refer to what was said in the case of the Cherokee Nation *vs.* Georgia, reported in 5 Peters. An application for an injunction was refused, upon the ground that the Cherokees were not a foreign state within the meaning of the Constitution ; but no doubt was expressed that a foreign state might sue one of our States in this court. The judgment was delivered by Chief-Justice Marshall, and he put the question in this form :

"The third article of the Constitution describes the extent of the judicial power. The second section closes the enumeration of the cases to which it is extended, with 'controversies between a State and citizens thereof, and foreign states, citizens or subjects.' The subsequent clause of the same section gives the Supreme Court original jurisdiction in all cases in which a State shall be a party. The party defendant may then unquestionably be sued in this court. May the plaintiff sue in it? Is the Cherokee nation a foreign state, in the sense in which that term is used in the Constitution?"

The conclusion being that it was not such a foreign state, the motion for an injunction was denied.

Mr. Justice Thompson dissented upon the point whether the Cherokee nation was a foreign state. In the course of his opinion he expressed himself as follows :

"That a State of this Union may be sued by a foreign state when a proper case exists and is presented, is too plainly and expressly declared in the Constitution to admit of doubt, and the first inquiry is whether the Cherokee nation is a foreign state, within the sense and meaning of the Constitution."

Again :

"Although there are many cases in which one of these United States has been sued by another, I am not aware of any instance in which one of the United States has been sued by a foreign state, but *no doubt can be entertained that such an action might be sustained*, upon a proper case being presented. It is expressly provided for in the Constitution, and this provision is certainly not to be rejected as entirely nugatory. Suppose a State, with the consent of Congress, should enter into an agreement with a foreign power, as might undoubtedly be done (Constitution, Article I, section 10), *for a loan of money, would not an action be sustained in this court to enforce payment thereof?*"

Am I not, therefore, warranted in answering to the first question that, whatever else may be said of the jurisdiction of this court over controversies between States, it certainly includes demands for money?

ARE DEMANDS WHICH HAVE BEEN ASSIGNED, FOR THE PURPOSE OF INDUCING A STATE TO INTERVENE FOR THEIR RECOVERY, EXCEPTED FROM THE JURISDICTION?

Before the eleventh amendment the question could hardly have arisen. That narrow rule of the common law which forbade the assignment of claims never applied to the sovereign, even in England, and in our States it has been generally abrogated. In New York it faded away many years ago. The assignment in the present case was made in New York, and by the law of that State vested a perfect title in the assignee. This assignee could give a valid acquittance of the demand, to any person, anywhere. And if a State becomes the undoubted owner of a claim, why may it not prosecute the same in this court? The answer which the learned counsel of the defendants gives, is that the assignee can not sue because the assignor could not. That, however, is not an answer in other cases. For example, no person but a resident of New York can sue a foreign corporation in the courts of that State, upon certain demands, yet it is not uncommon for a resident of another State to assign such a claim against a corporation to a resident of New York, so that he may maintain the suit. In every such case the assignor was prohibited by law from suing, and that was the reason why the assignment was made. An assignment for the purpose of enabling the assignee to sue is common practice (68 N. Y., 30; 6 Wall., 288). The provision of the Federal Judiciary Act of

1789, forbidding suits by assignees, admitted by implication the existence of the rule, and that a special provision was necessary to create an exception.

Is there anything in the reason or circumstances of the eleventh amendment which makes its construction an exception to the general rule? What was the reason and what were the circumstances? The history of the Constitution, of the judgment in Chisholm's case, of the consequent amendment, and the circumstances of the times, give the answer. The States were poor; they were overburdened with debts, and they were jealous of their independence. The idea of being compelled to answer to a private citizen, before any tribunal, was foreign to their habits and galling to their pride. Their repugnance was not to being made to answer, but being made to answer private persons. This I gather from the history of the period, and from the terms of the amendment. I do not find anywhere an expression of unwillingness to answer their equals. Why, otherwise, was the amendment couched in the terms in which it stands? Mark the words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States *by citizens of any other State, or by citizens or subjects of any foreign state.*" The objections of the Governor and Legislature of Massachusetts were expressed in similar terms, and appear to have been aimed only at suits by *private persons*. Consider the language of the resolve of June 23, 1793, ordering copies of the case to be printed, "in which is discussed the question whether a State is liable to be sued by a *private citizen* of another State," the speech of the Governor in which he says, "I can not conceive that the people of this Commonwealth . . . expected that each State should be held liable to answer, on compulsory civil process, to *any individual* resident in another State or in a foreign kingdom." The resolve adopted on the 27th of September was aimed at the doctrine "that a State is compellable to answer in any suit *by an individual or individuals*, in any court of the United States." The language of the Virginia resolution is to the same purport. And when this court, in Hollingsworth's case, 3 Dall., 378, delivered its opinion upon the effect of the amendment, it declared the same in these words: "That the amendment being authoritatively adopted, there could not be exercised any jurisdiction, in any case past or future, in which a

State was sued by *the citizens of another State, or by citizens or subjects of any foreign state.*"

The judiciary article had made the jurisdiction of the Supreme Court extend "to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or a citizen thereof and foreign states, citizens, or subjects." When this court decided that the article conferred jurisdiction of suits by private persons against the States, the amendment was made, but it went no further than to exclude the suits of private persons. The construction now claimed for this language is that the prohibition extends to suits by sovereigns intervening for their citizens. Is that a just construction? Why was not such an intention expressed, if it existed? It would have been easy to add these words to the amendment, as it stands: "or by any such State upon a claim derived from its citizens or subjects."

That is not a wise construction of a constitutional provision, which extends it beyond its plain meaning or evident intent. I venture to think that not a little uncertainty in our law has arisen from the habit of making constitutions or statutes mean something different from their language. Lawyers are not seldom astute to exclude from the operation of an enactment something that is really there, or to put in something that is not there. A suit by one State, acting on behalf of its citizens against another State, is not in terms prohibited. A suit by citizens themselves is prohibited. But it is argued that what can not be done directly can not be done indirectly. The answer is, that the suit of the State is not in any just sense a suit of the citizen directly or indirectly; it is the suit of the State—exercising its sovereign prerogative, which it may exercise or not in its discretion, both as to the time and extent of the exercise. The great controversy between the United States and Great Britain over the Alabama claims was prosecuted by the United States and not by the owners of the plundered ships. It could not properly be termed a prosecution by the citizens directly or indirectly, although the claims for which this Government intervened were private claims, the claims of our despoiled citizens. The State may stand forward whenever it pleases, as the champion of its citizens, for the very reason that they can not stand for themselves. If they

could themselves sue, the State could not ; because the reason of its intervention is the impossibility of the citizens obtaining justice for themselves. When the eleventh amendment was adopted, as when the Constitution was framed, the States were jealous of their rights. This jealousy led to the amendment ; but they did not, surely, intend thereby to give away any of their own rights ; and when Massachusetts and New York proposed and obtained the amending article in support of their rights as sovereigns, they could not have dreamed of surrendering any of the rights which they held also as sovereigns ; and among the greatest of them all was that of intervening on behalf of their own citizens, when all other redress should fail.

The defendant's argument proves too much. It would prevent a *foreign* state from intervening for its citizens or subjects. For example, according to the settled doctrine of the law of nations, Great Britain can intervene against another country on behalf of British creditors. If New York, on behalf of her citizens, can not maintain a suit in this court against Louisiana, neither could Great Britain on behalf of hers. The consolidated bonds of Louisiana are held in London as in New York. The Government of Great Britain, in cases less flagrant, has intervened to compel a foreign state to pay British creditors. Suppose it should intervene to obtain payment from Louisiana, in what form would that intervention come ? If the complaint were first addressed to the Executive of the United States, the answer might be, and probably would be : "The Supreme Court of the Union is open to you ; try that ; if you fail there, then, and not before, come to us." Suppose, then, a suit brought in the name of the Queen against Louisiana, for the payment of the debts due to English bondholders, could Louisiana throw the eleventh amendment in the Queen's face, as a bar to her suit ? If that could be done, this consequence might follow : the Queen could then complain to the United States of her failure to get justice from the State, call upon them as paramount in sovereignty to pay, and should the United States pay—as they must, if they do not proclaim themselves beyond the pale of international law—could they not then turn round and sue Louisiana in this court for the money paid ?

The argument would prove too much in another respect, for it would prove that a State could not sue another State, upon a draft of its financial officer purchased for remittance or invest-



ment. A State keeps its money on deposit in banks or other depositories, and draws it out on drafts. If one of these drafts finds its way into the Treasury of another State and is dishonored, can not the latter sue the former? The State of New York disbursed twelve million dollars last year, all paid by means of drafts on banks. These drafts passed from hand to hand. Some of them, no doubt, found their way to other States, and it might well be into the Treasuries of other States. Were they there worthless, because the Constitution forbids a State from entering into an agreement with another State? The question would probably be answered with a smile. The remittances by the English Government in payment for the Suez Canal shares were made through the Rothschilds; those which were made to us for the Alabama award were made in drafts which the British consul carried in his pocket to Washington. These were, no doubt, indorsed by the fiscal officers of the United States.

The fiscal officers of the States must do the same with drafts which they receive. If these should happen to be the drafts of the fiscal officers of other States, would the indorsement pass no title and create no obligation? We know that the States sometimes invest their funds in the bonds of other States. Massachusetts has at this moment a part of her funds thus invested. Her statutes make special provision for it. The following two sections are taken from her Revised Statutes (pp. 185, 186):

"SECTION 60. All moneys belonging to funds over which the Commonwealth has exclusive control, shall be invested in securities of the Commonwealth, in the notes or bonds of the several counties, cities, and towns thereof, *or in the scrip or bonds of the several New England States, of the State of New York, or of the United States*; and said investments shall be made by the Treasurer, with the approval of the Governor and Council.

"SEC. 61. The Governor shall annually, in the month of August, appoint a committee of the Council, who shall examine into the value of the notes and securities in charge of the Treasurer, and shall report thereupon to the Governor and Council, who may, if they find good and sufficient cause, direct the Treasurer to make sale of, or to collect by due course of law, any such notes or securities over which the Commonwealth has exclusive control, and to invest the proceeds according to the preceding section."

Among all the lawyers and statesmen of Massachusetts, probably not a single one has ever imagined that, by thus investing her funds, the State was making agreements with sister States in disregard of the Constitution, and was loading herself with for-

bidden and, therefore, worthless securities ; or, if the bonds were purchased, as they probably were, in the open market from Boston merchants, that, because the title was derived from such private sources, payment could not be enforced from a defaulting State.

But it is objected by our friends on the other side that the court will be overburdened if this jurisdiction is maintained. What an argument to address to a court, whose sole function is to decide what the law is, not what it ought to be ! The Constitution was not made for the judges, but the judges for the Constitution. It was not made by the courts, but by the people, for Presidents, Congresses, and Courts to execute and to obey. The consequence foretold, however, would not follow. Once let it be understood that, though a State can not be called to account by private citizens, it can be called to account by other States, and there will be little occasion to interfere. Good faith will be kept so soon as it is made evident that it can be enforced in case of need. If it be necessary, as I think it is, to lighten the burdens of the court, let some of its appellate duties be lessened. Overburdened it ever will be, so long as Congress obliges the judges to listen to evidence of patent rights, and to consider cases on appeal, which might better be left with the courts below.

If lawyers and statesmen would but remember that the human brain can perform only a certain amount of thinking, and the human hand only a certain amount of writing, and would then set themselves to work, sifting out of the mass of cases in the lower courts those only which must in the nature of things have their solution in one place and by one body, it would not be difficult so to adjust the business of the court as to measure it by the ability of the judges to perform it.

But of all the jurisdictions or subjects of jurisdiction over which this court is placed by the Constitution, none is comparable in importance with that which makes it the arbiter in all controversies of the States with each other, or with foreign states, save perhaps that other, which makes it the final arbiter, in all questions of disagreement between the organic law of the Republic on the one hand, and the acts of Congress and the Constitutions and statutes of the States on the other. These controversies outweigh all others that can arise to the end of time. To keep the peace in all circumstances is the great function of government, and that of a Federal Government to keep it between the con-

stituent members and between each of them and the sovereign whole.

The establishment of a tribunal for the determination of controversies between the States was one of the first, if not the first, object in organizing the confederation. Indeed, it may be regarded as a political axiom that federation is impossible without a provision for settling controversies between the constituent members. The original Articles of Confederation provided for it, though inadequately, but enough to show that whatever might be the form or power of the Federal body, an essential prerequisite was thought to be a provision for the settlement of interstate disputes ; and it may be presumed that no statesman would have thought a tribunal for the settlement of *some* of these disputes adequate, without providing for *all*. It must have been in the minds of those who worked for a Union, to take care that every cause of disagreement between the States should have the means of peaceful solution. The object of an interstate tribunal is to prevent dissensions among the States. This object would be defeated if the scheme did not provide for *all* dissensions ; in other words, for all controversies.

It is the interest of the people of this country—would it be extravagant to say the interest of the whole human race?—that the jurisdiction of this court over controversies between the States should be preserved intact. If no jurisdiction were conferred upon the court other than that of adjudging these controversies, it would still be the greatest tribunal in all the world. Foreigners have looked upon it with wonder. There is a passage in De Tocqueville's "Democracy in America" which I will take the liberty of quoting :

"In the nations of Europe, the courts of justice are only called upon to try the controversies of private individuals ; but the Supreme Court of the United States summons sovereign powers to its bar. When the clerk of the court advances on the steps of the tribunal, and simply says, 'The State of New York *vs.* The State of Ohio,' it is impossible not to feel that the court which he addresses is no ordinary body ; and when it is recollected that one of these parties represents one million, and the other two millions of men, one is struck by the responsibility of the seven judges, whose decision is about to satisfy or to disappoint so large a number of their fellow-citizens."

This is the language of an intelligent foreigner and an acute

observer. He is not alone. Thinking men everywhere have thought, and often expressed, the like.

Mr. John Stuart Mill, in his considerations on "Representative Government," speaking of this country, says :

"The tribunals which act as umpires between the Federal and State Governments, naturally also decide all disputes between two States. . . . The usual remedies between nations, war and diplomacy, being precluded by the Federal Union, it is necessary that a *judicial remedy* should supply their place. The Supreme Court of the Federation dispenses international law, and is the first example of what is now one of the most prominent wants of civilized society, a real International Tribunal."

M. Émile de Laveleye says :

"The hour will arrive for the establishment of a federation of nations, with a Supreme Court like that of the United States, the decisions of which will be carried out by authority; but it is not yet come. True civilization, true Christian sentiment, do not as yet exert a sufficiently general and undisputed sway over nations."

Thus the thoughts of philanthropists and Christians are turned toward the establishment of some tribunal for the settlement of international controversies, and they have looked at this court as the great exemplar of such a tribunal; one to be expected in a better age, to be struggled for now, and to be gained by successive and perhaps slow degrees. They see here a tribunal which sits in judgment between sovereign States; States more populous, more opulent, and more powerful than many of those which in the course of the ages have stimulated the intellects, molded the sentiments, and swayed the destinies of men. They see the processes going on quietly, without parade and without a jar. They see the judgments accepted with acquiescence or executed without resistance. Is it not natural that they who dream of better days should turn their eyes hither, and seeing the wondrous mechanism of our system should ask, whether that which was contrived to keep the peace between our States, or something like it, can not be also made to keep the peace between the other states of the world?

The present Lord Derby, speaking in the House of Commons, in 1867, on the Mermaid difficulty with Spain, said :

"Unhappily there is no international tribunal to which cases of this kind can be referred, and there is no international law by which parties can be required to refer cases of this kind. If such a tribunal existed, it would be a great benefit to the civilized world."

The true interpretation of our Constitution, in my humble judgment, places the controversies which a State of this Union can have with another before this court in the category of those controversies which a sovereign state of the world may have with another. Every right which New York had in 1789, every right which she had in 1796, she has now, except so far as it has been surrendered or changed by the Federal Constitution. *The form of the remedy has been changed.* Diplomacy, embargo, reprisal, and war have given way to judicial process and the decision of judges. The contentions of States must be settled by the arbitrament of reason or the arbitrament of the sword. It is the felicity and the glory of the American Constitution that it has substituted the former for the latter. If it has not substituted it for *all* controversies, it has left its work half undone.

I have dwelt thus long on the general question of jurisdiction, because it was convenient to discuss the whole question at once, rather than wait for the next and most important part of my argument. Recurring now to the particular question of assigned demands, I beg to say that the assignment of coupons made to the plaintiff before the present suit was brought was real, not colorable. The reality of an assignment is a matter quite distinct from the motive of it. The distinction is recognized in *Barney vs. Baltimore*, 6 Wallace, 288, where it is said by Mr. Justice Miller, delivering the judgment: "If the conveyance . . . had really transferred the interest of the former to the latter, although made for the avowed purpose of enabling the court to entertain jurisdiction of the case, it would have accomplished that purpose. *McDonald vs. Smalley* and several cases since have well established this rule." Though the motive in the present instance was to cause the suit to be brought, yet the transfer was real and irrevocable. The State has as complete control over the claim as the United States had over the Alabama claims. It can compound it without consulting the assignors, and, if the suit should turn out to be unsuccessful, the State is not required to return the property to the assignors. The title of the statute, pursuant to which the assignment was made, not less than the enactment itself, shows that the object of the State was to protect the rights of its citizens, and to that end, and that alone, it required them to cede their overdue coupons to the State; but in no event save that of recovery by the State were they to retain any interest in the claims or any control over the proceedings.

Upon this branch of the case, then, the real question to be answered is : "Whether a State can maintain a suit in this court against another State, upon the obligations of the latter, which have been transferred to the former by its citizens without reserve, though for the purpose of enabling the State to protect its citizens and assert their rights, in cases where they can not themselves assert them?" Indeed, since it is because they can not sue for themselves that the State sues for them, we have the strange contradiction presented of a demand founded on the inability of citizens to make it for themselves, answered by pleading this very inability of the citizens as a reason for refusing the State.

Let me here call the attention of the Court to an early discussion of the subject by Mr. B. R. Curtis, when he was at the bar, and to a later discussion by Mr. B. T. Johnson. The paper of the former was first published in the "North American Review" in January, 1844, and republished in the "Life and Writings" of Mr. Curtis, vol. ii, p. 93. In the first volume of the latter work, p. 102, is a letter of Judge Story, commending the article. Mr. Johnson's paper was published in the "American Law Review" for July, 1878. Some extracts from the first of these articles may be appropriate here :

"It has always been admitted to be one of the duties, and consequently one of the rights, of the sovereign power in every nation, to see that gross injustice be not done to its subjects or citizens in a foreign country. . . . We conceive also that a foreign state or sovereign may easily be placed in such a condition as to prosecute these claims. It is incident to the sovereign power that it should be able to make itself the owner of such claims. The rules as to the purchase and sale of rights of action which affect individuals are not applicable to the sovereign. The law presumes that the government of a country will not be guilty of champerty or maintenance. Under the common law the king might take an assignment of a debt and sue therefor in his own name, and we have no doubt that the same law exists in all cases. It seems to follow, then, that if the sovereign should take an assignment of a claim and sue therefor in the court of a foreign country, the comity and respect due to the foreign sovereign would necessarily prevent the court from inquiring into the causes and motives of the assignment, especially in a country where the common law exists, which makes all debts negotiable between the sovereign and the subject or citizen; and if this motive were inquired into it would appear that the foreign sovereign had taken the assignment merely to discharge a duty to his subjects by affording to them a remedy for a supposed wrong."

This closes what I have to say upon the claim of New York as assignee. The smallness of the amount of the coupons assigned can not affect the question. The Dartmouth College suit concerned directly only a few college records; Hampden resisted the tax of a few shillings; but who can estimate the effect of these controversies upon the generations which followed them?

THE NEXT QUESTION IS THE THIRD WHICH I PROPOSED AT THE BEGINNING OF MY ARGUMENT: CAN THE STATE OF NEW YORK, AS THE SOVEREIGN AND TRUSTEE OF ITS CITIZENS, IMPLEAD THE STATE OF LOUISIANA, IN THIS COURT, FOR THE VIOLATION OF THE LATTER'S OBLIGATIONS TO THOSE CITIZENS?

In discussing this question I lay out of view the assignment of the coupons, or rather I treat it as a transaction between the State and its own citizens, which the former chose to exact as the condition of its intervention. My argument reaches to this extent: if there had been no assignment, the State could have asserted its claim all the same; just as the United States asserted their claims for the spoliations of the Alabama, whether the original causes of action were assigned or not. The assignment can not impair the claim of the State, if it does not aid it. Had the United States in the beginning of the Alabama depredations given notice that they would intervene only on behalf of those who made over their claims to their Government, they would not thereby have forfeited or impaired their rights under the law of nations, either as to the claims assigned or those not assigned. It surely must be competent to a State, since it can intervene or not in its discretion, to require any particular formality or evidence as the condition of intervention. Upon this theory, the claim now made is quite independent of that already discussed.

I make the argument, indeed, as if no assignment had ever been made. It has not been objected that the claim on behalf of citizens of New York in general goes beyond the terms of the statute under which the assignment was delivered, nor would such an objection be entertained in the present condition of the litigation. If it could have been made at all, it should have been made by a motion, in the earlier stages of the case. But if it had been then made, it could not have prevailed. The State is here repre-

sented by its chief law officer, the Attorney-General, to say nothing of the Governor of the State having signed the answer to the cross-bill. The authority of the Attorney-General could not have been questioned by the defendants, any more than the authority of an attorney in an ordinary suit could have been questioned on the trial of the issues in chief. The authority of the Governor or the Attorney-General, to maintain the present demand upon Louisiana, should seem to be no more examinable here than the authority of the President and Senate could have been examinable before the arbitrators at Geneva.

That the suit is properly instituted, and that the claim thereon on behalf of all the New York holders of Louisiana bonds is properly made, should seem then to be unquestionable.

The Court will bear in mind that the bill in this case covers two distinct causes of action, and seeks relief either against the State and its officers, or against the officers alone. The standing of the plaintiff can be maintained in any of these aspects, though I am now discussing only the claim of New York against Louisiana—State against State—under the law of nations, and without reference to any transfer of the bonds, or ownership vested in the plaintiff.

In this discussion there are two propositions to be maintained : one, that before the adoption of the Constitution any State now in this Union would have had the right to complain against any other independent State for the non-payment of its debts due to citizens of the complaining State, and, if need were, to enforce the complaint by all the means known to the law of nations ; and the other, that by entering into the Union the States have not lost this right, but have changed only the form of their remedy. The printed brief put in on behalf of the plaintiff contains references to various authorities in support of the first proposition. The doctrine thus stated is not disputed by any publicist or any statesman, so far as I am aware. There may be cavil about the *duty* of intervening ; there may be observations here and there about the expediency of capitalists staying at home and not investing or lending abroad ; there may be complaints of abuses of the weak, suffered from the strong ; but there has never been to my knowledge a denial by anybody, whose opinion is of the least value, that every sovereign state has had, since the law of nations began, and has now, the right to make the cause of its injured citizens its own, and to insist, by all the means known to the in-



tercourse of nations, that the obligations which another state has contracted with these citizens shall be fulfilled.

To advise capitalists to stay at home and not invest or lend abroad would be anti-social and contrary to the drift of modern sentiment. There is a tide in the affairs of men as visible and as resistless as the tides which the moon makes to roll from side to side of the globe, and that tide is now setting with a force, accumulating and hastening as it moves, toward human brotherhood, and the free and helpful intercourse of all the children of men. And of all the states in the world the Southern States of this Union are the most in need of its influence. If they would listen to true warning voices, they would be often told that what they want most of all is faith in their fellow-men, and fidelity to their own engagements. Between the Potomac and the Rio Grande is spread a region which, for the fertility of its soil, the variety of its climate, the facility of its harbors, and the affluence of its rivers, has scarcely its parallel on the face of the earth. Let it be understood that the inhabitants of this region are grouped in commonwealths, every one of which takes for its rule of action good faith in every vicissitude of prosperous or adverse fortune, and they and their children, and their children's children, will be blessed with "the blessings of heaven above, and the blessings of the deep that lieth under."

Besides the citations contained in our brief, taken from the treatises of publicists and from state papers, to show the right of New York under the laws of nations to call upon Louisiana for the fulfillment of its obligations to the citizens of New York, I beg leave to refer to a few facts in our own history.

As evidence of the opinions prevailing when the Constitution was framed, respecting the right of a State to intervene for the payment of debts due to its citizens by other States, I will quote a passage from the argument of Mr. Bradford, Attorney-General of Pennsylvania, in the case of Nathan against the Commonwealth of Virginia, reported in the notes to 1 Dallas, 77.

A foreign attachment was issued in 1781, on behalf of Nathan against Virginia, and levied upon clothing imported by that State into Philadelphia. The delegates in Congress from Virginia, considering this a violation of the law of nations, applied to the Supreme Executive Council of Pennsylvania, by whom the sheriff was ordered to give up the goods. Nathan's counsel, finding that the sheriff suppressed the writ, making no return, obtained

a rule to show cause why he should not return it. The Attorney-General opposed the motion, and it was denied. In the course of his argument he said :

"That the plaintiff was under no peculiar inconvenience. Every creditor of this State, or of the United States, lay under the same. If his demand was just, Virginia would, upon application, do what was right. *If not, and flagrant injustice was done him, he might, if a subject of this State, and entitled to its protection, complain to the executive power of Pennsylvania.*"

The provisional treaty, concluded between the United States and Great Britain on the 30th of November, 1782, contained this article :

"It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted."

The sixth article of Jay's treaty contained a more ample and definite provision in favor of British creditors against American debtors, and, because this was not fully performed, the United States stipulated by the additional convention of 1802 to pay to Great Britain £600,000 "for the use of the persons described in the sixth article."

The convention between Great Britain, France, and Spain for intervention in Mexico, and the letter of our Secretary of State offering to guarantee the payment of the interest on the Mexican debt for the sake of preventing the intervention, not only recognized the existence of the rule of international law, but afforded an instance of its enforcement on the largest scale—an unjust and armed enforcement, which led to the overthrow of the Franco-Mexican Empire, and, as some think, to the overthrow of the Second French Empire itself. England and France are now intervening in the affairs of Egypt, by a series of measures that had their origin in the debts of the Khedive to British and French bondholders. Our own relations during the present year with Peru and Chili are so many witnesses to the existence of that rule of international law of which I am speaking. In short, there are few doctrines of the law of nations more firmly established than this, of the *right* of intervention to protect the creditors of an intervening state.

Have the States of this Union lost this right? If they have, let it be shown how or by what means it has been lost. There is no article of the Constitution by which it has been expressly

taken away. On the contrary, the tenth amendment declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." Powers here mean rights, or rather the former is the more comprehensive term of the two, and includes the latter. Among the definitions of power are: "Ability to act; the faculty of doing or performing; the exercise of a faculty; capacity for action or performance."

I submit now that I have established this proposition: An independent state is by the law of nations clothed with the right or faculty of making an imperative demand upon another independent state, for the payment of debts, which it owes to the citizens of the former. The right of New York, outside of the Union, to make such a demand would have been unquestioned; inside of the Union, New York has the same right.

How is the demand to be made? Formerly, under the law of nations, it would have been made by diplomatic negotiation, and, if that failed, then by non-intercourse, reprisals or war. Now, under the Constitution, diplomacy is supposed to be indirectly prohibited, for the reason that a compact or an agreement, except with the consent of Congress, is prohibited. Non-intercourse, reprisals, and war are directly prohibited. What, then, remains? The Constitution gives the answer. This demand made by New York upon Louisiana, for the payment of debts due to the citizens of New York, can be made in this court and nowhere else.

PASSING NOW TO OTHER CONSIDERATIONS AND OTHER VIEWS OF THE CASE, WE COME TO THE FOURTH AND FIFTH QUESTIONS, PROPOUNDED AT THE OUTSET. The financial officers of Louisiana proceeded under the statute and Constitution of that State, as they stood when the consolidated bonds were issued, to levy and collect taxes thus authorized, and had accumulated a large sum of money when the repudiating ordinance was passed. This money now lies in the same hands, awaiting the judgment of this court. Can the judgment reach it and order therefrom the payment of the coupons belonging to the plaintiff? THIS IS THE FOURTH QUESTION.

Another follows:

Should the accumulated fund be found insufficient to pay all the outstanding and overdue coupons, can the same financial

officers be ordered, by the judgment, to proceed in the levy and collection of the prescribed taxes, to meet the deficiency? THIS IS THE FIFTH QUESTION.

These two questions may be considered separately, because they involve, to some extent, different reasons. Both assume, however, that the plaintiff is the owner and holder of the coupons. Being so, can the State of New York maintain a suit in this court to reach *these funds and these officers of finance*? That this court has original jurisdiction of a suit by a State against individuals is declared by the Constitution, and has been so decided by this court, in the case of Texas against White, 7 Wallace, 700. New York then being properly here, and the individual defendants being properly here also, has the former a right to any portion of the funds in the hands of the latter?

We are now disembarrassed of the question whether *Louisiana* can be sued upon the assigned coupons. That State might even be dismissed from the case. We might leave out of view every consideration except that of the plaintiff holding the coupons, and of the individual defendants holding funds devoted to their payment. Under these circumstances, can the court order these defendants to pay these coupons, or a proportionate part, having regard to the whole amount of the accumulated fund and the whole amount of the unpaid coupons? This proportionate amount can be easily ascertained by an accounting under the direction of the court.

There can be no doubt that it was the intention of the parties, at the time of the exchange of the old debt for the consolidated bonds, to make the payment absolutely certain, beyond the reach of repudiating politicians or a repudiating people—or, rather, I might say, it was the intention of those who then acted for Louisiana to make the holders of the old debt think so, as an inducement to accepting the compromise. What was it that they did? They issued the bonds of the State, promising the payment of a fixed sum, at a fixed time, with a fixed rate of interest; levied a tax of five and a half mills on the dollar upon the assessed value of all real and personal property; designated certain officers whose duty it should be to assess and collect the tax and pay the bonds. *This arrangement was to last till the payment of the bonds, principal and interest, should be accomplished.* A diversion of the fund to any other object was declared to be a felony; obstruction of the machinery devised for the payment

was declared to be a misdemeanor ; and, finally, it was ordained that each provision of the act constituted a contract between the State and each holder of the bonds.

There is here no room for cavil about the power of a Legislature, or the constitutionality of a statute, which affects or limits the taxing power of a State ; because the statute was ratified by an amendment of the Constitution. The compact between the State and its creditors was as irrevocable as it was precise, if the people of the State in the exercise of their original and independent sovereignty had the power to make it. That they had the power is clear, unless it had been delegated to the United States, or prohibited to the State. So it is expressly declared by the tenth amendment. Now, it is certain that the power to levy and collect State taxes and pay State debts has not been delegated to the United States nor prohibited to the States. It therefore follows that the compact between Louisiana and her consolidated bondholders was valid and irrevocable.

It was not only irrevocable by its terms, but it became irrevocable by force of the Federal Constitution, which declares that no State shall pass any law impairing the obligation of contracts. Subsequent legislation or constitutional ordinance by Louisiana, purporting to annul or qualify the terms of this compact, was a nullity, to be disregarded as though it had never been. We are thus to look at the statute and ordinance under which the consolidated bonds were issued and taken, as if from that hour until now there had been no Legislative Assembly held in Louisiana, and no convention of her people.

Here, then, stand the holder of the obligations and the holders of the funds designated for their payment. What valid reason can be given why the payment should not be enforced ? It is said that the funds belong to the State, and can not be controlled by judicial process. But in what sense are they the funds of the State ? They are the proceeds of State taxes, no doubt, but these taxes have been appropriated to a particular purpose, and are in the hands of certain officers for the fulfillment of that purpose. A subsequent direction by any State authority, assuming to divert them to any other purpose, is a violation of the original compact, and therefore a nullity. The disposition to be made of the funds is precisely the same as if such subsequent direction had not been made. Suppose that neither Legislature nor convention had met since 1874, but that the fiscal officers,

who had collected the taxes, had, of their own motion, refused to pay the interest on the bonds. The answer that would then have been given to a suit against them is the only answer that can be given now.

When I said that the contract between Louisiana and the bondholders was irrevocable, I should perhaps have added that there is one argument, however, which, if it were sound, would reach beyond the Federal and State Constitutions, and that is that a nation (and, if so, an American State) can not impair its own sovereignty, and therefore can not make an irrevocable contract. The argument is, however, unsound both in its premises and in its conclusions. A State can impair its sovereignty. Every State in this Union did so when it entered into the federal bond. It not only impaired its sovereignty for the time being, but entered into an irrevocable compact, forming, in the expressive and now famous words of the late Chief-Justice, "an indestructible union of indestructible States." With this great example of our own Federal Union before us, it will not do to say that an independent State can not impair its own sovereignty. If it can impair it in one respect, it can in another. Take the power of taxation, for example. There is nothing sacred about it. Indeed, there is scarce any particular in which the power of a government is less sacred than in the matter of taxes. A tax is a forced contribution; and when it is considered to what base uses the proceeds of these contributions are so often misapplied—overgrown armies, worthless navies, fictitious pensions and arrears of pensions, river and harbor jobs, post-office star routes, and robberies of all sorts—one is not pleased to hear overmuch of the right, sovereign and sacred, of taxation. But whether the power to tax be well or ill used, nothing can be more certain than that it may be made the subject of contract. This court has in many instances declared acts of the State Legislatures void, because they attempted to revoke contracts made by previous Legislatures, exempting particular property from taxation. Again, it is supposed to be one of the attributes of sovereignty to exercise control over all persons and property within the territorial limits, yet it was early decided by this court that a State by its Legislature, without an organic act of the people, might bargain away its control over corporations. Every treaty, to a certain extent, impairs the sovereignty of the high contracting parties, sometimes for a limited period, and then again for all time. Foreign ships enter and

leave American ports by virtue of treaties, which forbid the American Congress to close American ports to all but domestic ships, and these treaties can not be abrogated except after a stipulated delay.

An independent State, being under no outside control, has the legal faculty of doing whatever it pleases with itself. It may destroy or limit its separate existence or any of its separate functions. Suppose that in the statutes and ordinances of Louisiana a stipulation had been inserted that every holder of a bond should have the right to sue the State in one of its own courts, would not this stipulation have been valid? The Parliament of England might authorize a loan for a special object, and set apart a sinking fund for the payment of the loan, place it in charge of a specified depository, and provide that the fund-holders might have recourse to the Queen's courts against the depository for the proper application of the funds; and is it to be doubted that a repeal of these provisions by a later Parliament would be a breach of faith and a violation of the contract? Whatever might be said about the validity of such a subsequent act, having regard to the omnipotence of Parliament, there can be no doubt that if Parliament were not omnipotent and could pass no law impairing the obligation of contracts, and there were a tribunal to enforce such a constitutional provision, the subsequent act would be held void, and the previous one would be enforced.

Applying the principles, which I have thus endeavored to establish, to the present case, we see here a contract explicit and specific. It points out precisely what is to be done, and the persons who are to do it. If they act, as they are required by the constitution and the law to act, the money will be raised and paid; if they do not thus act, the judiciary should apply the remedy.

The more narrowly we look into this contract, the more clearly we see that it was as stringent as language could make it. If one were to set about preparing a plan for making the repayment of a Government loan perfectly safe, he could scarcely devise one better than that arranged by Louisiana in this instance. First, an act of Assembly was passed, notice of which was to be published in the journals of New Orleans, New York, London, Paris, and Amsterdam, entitled "An act to provide for funding obligations of the State, by exchange for bonds; *to provide for principal and interest of said bonds; to establish a Board of Liquidation*

*lation ; to authorize certain judicial proceedings against it ; to define and punish violations of this act ; to prohibit certain officers diverting funds except as provided by law, and to punish violations therefor ; to levy a continuing tax and provide a continuing appropriation for said bonds ; to make a contract between the State and holders of said bonds ; to prohibit injunctions in certain cases ; to limit the indebtedness of the State and to limit State taxes ; to annul certain grants of State aid ; to prohibit the modification, novation, or extension of any contract heretofore made for State aid ; to provide for the receipt of certain warrants for certain taxes, and to repeal all conflicting laws."*

By this act a permanent board was established, called a Board of Liquidation, consisting of the Governor, Lieutenant-Governor, Auditor, Treasurer, Secretary of State, and Speaker of the House of Representatives, and a seventh person to be elected by them, called a fiscal agent for the State. This board has been in existence ever since its establishment. It was to exchange consolidated bonds of the State, having forty years to run and bearing interest at seven per cent, for the outstanding bonds and Auditor's warrants, at the rate of sixty cents on the dollar. To secure the payment of these consolidated bonds, beyond peradventure, a tax of five and one half mills on the dollar upon all real and personal property in the State was levied. This tax was to be collected for the purpose of paying the interest and principal of the bonds, and was "*set apart to that purpose, and no other.*" It was declared to be a "*continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest, and the said appropriation shall be a continuing annual appropriation during the same period, and this levy and appropriation shall authorize and make it the duty of the Auditor and Treasurer and the said board, respectively, to collect said tax annually, and pay said interest and redeem said bonds, until the same shall be fully discharged.*"

The tenth section provided that "any judge, tax-collector, or any officer of the State obstructing the execution of this act, or any part of it, or failing to perform his official duty thereunder, shall be deemed guilty of a misdemeanor."

The eleventh section provided that "*each provision of this act shall be, and is hereby declared to be, a contract between the State of Louisiana and each and every holder of the bonds issued under this act.*"



The thirteenth section provided that "the entire State debt prior to the year of our Lord one thousand nine hundred and fourteen shall never be increased, directly or indirectly, beyond the sum of fifteen million dollars hereby authorized ; *it being the intent and object of this act, and of the exchanges to be effected thereunder, to reduce and restrict the whole indebtedness of the State to a sum not exceeding fifteen million dollars, and to agree with the holders of the consolidated bonds to be issued hereunder, that the said indebtedness shall not be increased beyond said sum during said period.*"

An amendment of the Constitution of Louisiana was thereupon adopted, the first section of which is as follows : "*The issue of consolidated bonds authorized by the General Assembly of the State at its regular session, in the year 1874, is hereby declared to create a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair. The said bonds shall be a valid obligation of the State in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof, or the levy and collection of the tax therefor. To secure such levy, collection, and payment, the judicial power shall be exercised when necessary. The tax required for the payment of principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest, and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds, as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the Treasury.*"

These bonds were issued and taken. Hundreds of thousands of them are held by citizens of New York, and that State holds by assignment some of the coupons. The Board of Liquidation remains intact ; and inasmuch as public officers are presumed to do their duty, the board is presumed to have levied and collected the tax in all these years, and of course has ample funds on hand wherewith to pay the interest already accrued. This board has, moreover, the power to levy and collect the tax and pay the interest as well as the principal accruing hereafter.

The State of New York, the State of Louisiana, and the Board of Liquidation, including the Treasurer of the State, are now in court. The plaintiff asks that the interest already ac-

crued be paid. What reason can be given for not paying it? Not that the people of Louisiana in 1879 prohibited the payment, for that prohibition was a nullity. That the transaction of 1874 created a contract between the State and the holders of the bonds, which could not be impaired by any subsequent act of the State, can not at this time be questioned. This court has over and over again affirmed the principle on which this contract now stands firm as adamant.

The question, I have said, is to be treated as if there had been no subsequent constitutional ordinance or act of Assembly. Standing thus alone upon the ordinance and act of 1874, what legal answer can the Board of Liquidation make to our demand for payment? They can not say that the money is not in their hands. It is presumed to be there. They have not denied that it is there, and, if they had made the denial, they should have followed it by proving that they had not done their duty. Besides this, the act of Assembly passed this very year (pages 36 and folio 111 of the record) shows that there is a large fund on hand. Nor can these defendants say that the fund has not been appropriated by the State Legislature, and *appropriated to the payment of this interest*. It was appropriated by the act and ordinance of 1874. That ordinance declared in so many words, as we have seen, that "*the tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and interest; and the proceeds shall be paid by the Treasurer of the State to the holders of said bonds as the principal and interest of the same shall fall due; and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the Treasury.*"

The act of Assembly had already declared that "*the interest tax aforesaid shall be a continuing annual tax until the said consolidated bonds shall be paid or redeemed, principal and interest, and the said appropriation shall be a continuing annual appropriation during the same period, and this levy and appropriation shall authorize and make it the duty of the Auditor and Treasurer and the said board, respectively, to collect said tax annually and pay said interest and redeem the said bonds until the same shall be fully discharged.*"

This constitutional ordinance was, of course, valid, and the act was valid, because made so by the ordinance, if for no other

reason. We are accustomed to annual appropriations because our Legislatures in general have annual sessions ; but it is no more necessary, in the nature of things, that an appropriation should be annual than that it should be biennial, or for any term of years, or for life. In England the appropriation to the personal service of the sovereign is made at the beginning of the reign, for the whole reign. In States where legislative sessions are biennial, the appropriations must be for two years. The session might be once in five years, or once in forty, for the matter of that. In the present instance, the appropriation was a continuing one for forty years ; that is, if the bonds were not sooner redeemed.

The duty, then, of this Board of Liquidation, to make the payment being clear, and the right of holders of the coupons to payment out of the fund being equally clear, and the performance of this plain duty being refused, the only question that remains is the question of remedy. Is this court powerless to direct the board or the Treasurer to pay the plaintiff out of the fund already collected and in hand ? I am now speaking only of the coupons which belong to the plaintiff. The defendant's counsel answers, that the funds belong to the State, and therefore can not be touched by the court. The counsel is at fault, both as to premises and conclusion. The funds do not really belong to the State, as I have already said ; they do not belong to it, any more than money deposited in bank, to my credit, belongs to the bank, and not to me. Though the bank may hold the money as depository, and may have perhaps mingled it with other moneys in its hands, it holds this in trust for me. It is in equity mine, even though not segregated from the rest, and I have an equitable lien upon it. *But the Louisiana act of Assembly did set apart this fund and appropriate it to this purpose, and no other.* Here are the words : " That a tax of five and a half mills on the dollar, of the assessed value of all real and personal property in the State, is hereby annually levied, and shall be collected for the purpose of paying the interest and principal of the consolidated bonds herein authorized, and *the revenue derived therefrom is hereby set apart and appropriated to that purpose and no other.*"

Suppose, however, that the fund did belong to the State, and had not been set apart, the statute and Constitution of 1874 have ordered it paid. They constituted an order for the payment. The order could not have been stronger, if it had been in the

form of a draft upon the fund. Suppose that the plaintiff had procured a draft of Louisiana on the Board of Liquidation for the payment of these coupons, and the payment had been refused, and this suit had been thereupon brought, could the board have defended themselves, in not paying, by answering that the fund belongs to the State? So far, then, as these funds in the hands of the Board of Liquidation are liable to the drafts of the Treasurer, the remedy is perfect. A bill in equity for payment out of the fund in hand is appropriate, since, if there be not enough, an accounting must be had, to ascertain what proportion of the money on hand is applicable to the plaintiff's demand.

If there be a deficiency, and further funds have to be raised, an order in the nature of a mandamus would be an appropriate remedy to compel the levy and collection of the tax. But when a State of the Union comes into this court, its remedy is not to be measured and restricted by the rules which apply to the litigation of private persons. This court has already said in *Board of Liquidation vs. Macomb*, that an injunction and mandamus are appropriate remedies to be applied sometimes in the same suit, and in *Rhode Island vs. Massachusetts*, the court declared, in the most emphatic manner, as if to preclude all future cavil, that it would mold the process to suit the demands of justice. Here are trust funds, and the suit is in part to enforce the trust.

Before considering the question respecting the form of proceeding, however, should it not be considered whether, in a suit between States, where the proceedings are not regulated by statute, but molded by the court, to suit the exigency of the case, there should be, or can be, any *question of form*? The parties are here, the facts are made known, and the judgment should be pronounced according to the right of the case. How would it appear to the world when told, how would it look in the books when read, that the laws of the republic require New York first to recover a judgment at law, then apply by a bill in equity to reach the funds in the hands of the Board of Liquidation, and after that ask for a mandamus to compel the board to levy and collect the tax and pay over the proceeds!

In the case of *Florida against Georgia* (17 How., 492), a question of form arose, and the Court, through the Chief-Justice, said:

"At a very early period of the Government a doubt arose whether the court could exercise its original jurisdiction without a previous act of Congress regulating the process and mode of proceeding; but the court, upon

much consideration, held that, although Congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases as fully as in any other court, yet the omission of the legislature on the subject could not deprive the court of the jurisdiction conferred. It was a duty imposed upon the court, and in the absence of any legislation by Congress *the court itself was authorized to prescribe its mode and form of proceeding so as to accomplish the end for which the jurisdiction was given ; . . . and it became, therefore, the duty of the court to mold its proceedings for itself in a manner that would best attain the ends of justice, and enable it to exercise conveniently the power conferred ; and in doing this it was without doubt one of its first objects to disengage them from all unnecessary technicalities and niceties, and to conduct the proceedings in the simplest form in which the ends of justice could be attained."*

The present case is peculiar in most of its circumstances. We are dealing, not with a legislative, or an imperfect, or an indefinite compact, but with a constitutional compact, full and definite in all its parts. A State of this Union effected a compromise with its creditors at the rate of sixty cents on the dollar, and to obtain it pledged and appropriated to them a certain tax on all property in the State, to last until the payment of the new and renewed debt ; and, in order to make the levy, collection, and payment sure beyond interference of Legislature or people, established a permanent board, with power to do these things of itself—power to deliver the bonds and to pay them—to make the promise and to fulfill it. The compact was not only made by the Legislature, but ratified by the people in their sovereign capacity, by an organic act—the highest and most solemn known to the Commonwealth—such an act as makes governments and institutions. The board thus created proceeded to exercise its power by levying the tax. This board is still in existence and acting. It is under these circumstances that the State of New York seeks a judgment for the payment of the money which is its due.

In other words, in order to induce the creditors to consent to a reduction of the State debt, the people of the State, as a part of their constitution of government, established a permanent board of officers, with power to issue new bonds in exchange for old, at a reduced rate, and to assure the payment by levying and collecting taxes, at a rate fixed in the Constitution, and to last until payment should be made in full, and fencing this assurance round with various safeguards, making it as much impossible for the engagement to be broken as it can be made in human affairs. This engagement, the most solemn possible for any people, they

essayed five years afterward to break. And the question now is whether the Constitution and the statute by which this engagement was effected were, after all, but so much waste paper.

This court has frequently exercised the power to compel public officers to assess and collect taxes for the payment of debts. It is true that, in most of these cases, the debts to be paid were the debts of municipalities, but it is not easy to see how that fact is important. The question is not so much, who owes the debt, as whose duty it is to make the payment, or provide the funds. Municipalities, moreover, are but State agencies; the power of taxing is a State power; the officers who impose and collect the taxes are State officers. If they can be ordered to levy a tax of one kind, they can be ordered to levy a tax of another kind.

There is nothing especially sacred in State or Federal Treasuries, or in State or Federal officers of finance. Nothing is sacred but right and law. If money in a Government Treasury is pledged to me, my right to have it is more sacred than the right of its keepers to withhold it. A court of law, which is but another name for law itself, has often, in dispensing justice, laid its hand on a Government Treasury and the Treasurer. We have heard a great deal of the *discretion* of officials. They have no discretion whether to do or not to do that which the law commands; and in this country of law, where no man is above it, as none is beneath it, the judicial department has the power, and having this it is its duty, for the protection of private rights, to oblige every man in office, as it obliges every man out of office, to fulfill the law. No man is our master. We have no master but the law of the land, and when that law directs any one, high or low, to do an act, in which a citizen has an interest, he should be compelled to do it. If he has a discretion, that is, a right to judge for himself, whether he will or will not do the particular thing demanded, he can not be compelled by the courts to do it; but if the thing to be done is certain (and that is certain, according to the law, which can be made certain), then he can be compelled to its performance.

Let us see how far the courts have sanctioned these theories. In *Marbury's* case, it was decided that a Federal Secretary of State could be reached by mandamus, when he had no discretion whether to deliver or withhold a commission to office. In *Osborne's* case, money was taken out of the Treasury of Ohio against the will of the Treasurer. True, a like sum had been

taken from the bank and put into the Treasury. The judgment required it to be repaid out of the State Treasury.

In Kendall's case, it was decided that a mandamus could be issued compelling the Postmaster-General to credit certain persons with a sum of money as due to them. The Court said that—

"It would be an alarming doctrine that Congress can not impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character."

In the Knox County Commissioner's case (24 How., 383), it was declared by Mr. Justice Grier, delivering the opinion of the court, that—

"Even assuming that a general law of Indiana permits the public property of the country to be levied on and sold for the ordinary indebtedness of the county, it is clear that the bonds and coupons issued under the special provisions of this act were not left to this uncertain and insufficient remedy. The act provides a special fund for the payment of these obligations, on the faith and credit of which they were negotiated. It is especially incorporated into the contract that this corporation shall assess a tax for the special purpose of paying the interest on these coupons."

In Van Hoffman's case (4 Wall., 535) the head-note is as follows:

"1. Where a statute has authorized a municipal corporation to issue bonds and to exercise the power of local taxation in order to pay them, and persons have bought and paid value for bonds issued accordingly, the power of taxation thus given is a contract within the meaning of the Constitution, and can not be withdrawn until the contract is satisfied. The State and the corporation in such a case are equally bound.

"2. A subsequently passed statute, which repeals or restricts the power of taxation so previously given, is, in so far as it affects bonds bought and held under the circumstances mentioned, a nullity.

"3. It is the duty of the corporation to impose and collect the taxes in all respects as if the second statute had not been passed.

"4. If it does not perform this duty, a *mandamus* will lie to compel it."

The opinion of the court, delivered by Mr. Justice Swayne, has the following language (pp. 554, 555):

"It is well settled that a State may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where

a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given can not be withdrawn until the contract is satisfied. The State and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor can not annul, and which the donee is bound to execute; and neither the State nor the corporation can any more impair the obligation of the contract in this way than in any other.

"The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1868 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes, in all respects as if that act had not been passed. A different result would leave nothing of the contract, but an abstract right—of no practical value—and render the protection of the Constitution a shadow and a delusion."

In Davis against Gray (16 Wall., 203), it was ruled—

"That a Circuit Court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States when such execution will violate the rights of the complainant.

"That where a State is concerned the State should be made a party if it can be done; that it can not be done is a sufficient reason for the omission to do it, and the court may proceed to decree against her officers in all respects as if she were a party to the record."

In Macomb's case (92 U. S., 531), an injunction, in favor of the holder of a consolidated bond, was sustained against the same Board of Liquidation that is now before the court, forbidding it to obey a later statute of Louisiana, requiring the issue of consolidated bonds for the payment of the debt of the State to the Louisiana Levee Company. The opinion is most important, as touching the present case :

"It was the special object of that scheme, by providing extraordinary security and sanctions for the payment of the consolidated bonds, to induce the public creditors to reduce their claims forty per cent and exchange them for these new securities, and thus diminish the aggregate indebtedness of the State \$10,000,000. . . .

"On this branch of the subject the numerous and well-considered cases heretofore decided by this court leave little to be said. The objections to proceeding against State officers by *mandamus* or injunction are: first, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its con-



sent, can not be sued by an individual, and a court can not substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance, and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation can not be had at law, may have an injunction to prevent it. In such cases, the writs of *mandamus* and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law, for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void."

In Meriwether's case (102 U. S., 472), where an attempt was made by the Legislature of Tennessee to defeat the previous action of this court with respect to the enforcement of the power of taxation, by the dissolution of municipal corporations, relief by bill was refused solely upon the ground, as I understand it, that there were no tax-officers in existence.

In Hartman's case (102 U. S., 672), a *mandamus* was ordered to compel the Treasurer of Richmond, who had in charge the duty of collecting the State taxes in that city, to receive in payment the coupons of State bonds, issued pursuant to the funding act of the State which contained a stipulation that they should be received for taxes. Here was a command issued to a State officer, for the enforcement of a promise of the State—a promise of imperfect obligation, says my learned friend—which promise a subsequent Legislature had attempted to impair by taxing the coupons.

In Wolff's case (103 U. S., 358), it was decided that—

"As long as a city exists, laws are void which withdraw or restrict her taxing power so as to impair the obligation of her contracts, made upon a pledge expressly or impliedly given, that it shall be exercised for their fulfillment."

"Although such laws be enacted, *mandamus* to compel her to exercise that power to the extent she possessed it before their passage, will lie at the suit of a party to such a contract who has no other adequate remedy to enforce it."

I quote several passages from the opinion, because the argument is a better one than I can make :

"The argument in support of the act is substantially this: that the taxing power belongs exclusively to the legislative department of the Government, and when delegated to a municipal corporation may, equally with other powers of the corporation, be revoked or restricted at the pleasure of the Legislature.

"It is true that the power of taxation belongs exclusively to the legislative department, and that the Legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, subject, however, to this qualification, which attends all State legislation, that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States, and, among other things, shall not operate directly upon contracts of the corporation, so as to impair their obligation, by abrogating or lessening the means of their enforcement. Legislation producing this latter result, not indirectly, as a consequence of legitimate measures taken, as will sometimes happen, but directly by operating upon these means, is prohibited by the Constitution, and must be disregarded—treated as if never enacted—by all courts recognizing the Constitution as the paramount law of the land. This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. So long as the corporation continues in existence, the court has said that the control of the Legislature over the power of taxation delegated to it is restrained to cases where such control does not impair the obligation of contracts made upon a pledge, expressly or impliedly given, that the power should be exercised for their fulfillment. However great the control of the Legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts. . . .

"This prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the State, and to those of its agents acting under its authority, as well as to contracts between individuals. And that obligation is impaired, in the sense of the Constitution, when the means by which a contract at the time of its execution could be enforced, that is, by which the parties could be *obliged* to perform it, are rendered less efficacious by legislation operating directly upon those means. As observed by the court in the case cited: 'Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution. The obligation of a contract is the law which binds the parties to perform their agreement.'

"The restraint upon the Legislature, to the extent mentioned, by the contract clause of the Constitution, against revoking or limiting the power

of taxation delegated by it to municipal bodies as the means of carrying out the purposes of their incorporation, or purposes designed for their benefit, is a different matter from that of exempting property from taxation; and even in the latter case it has been adjudged in repeated instances that one Legislature can bind its successors. The restraint in no respect impairs the taxing power of the existing Legislature or of its successors, or removes any property from its reach.

"These views are not inconsistent with the doctrine declared by the decision of the court in the recent case of *Meriwether vs. Garrett*, 102 U. S., 473. There the charter of the city of Memphis had been repealed, and the State had taken the control and custody of her public property, and assumed the collection of the taxes previously levied, and their application to the payment of her indebtedness. The city with all her officers having thus gone out of existence, there was no organization left—no machinery upon which the courts could act by *mandamus* for the enforcement of her obligations to creditors. The question considered, therefore, was whether the taxes levied before the repeal of the charter, but not paid, were assets which the court could collect through a receiver and apply upon judgments against the city.

"Here the municipal body that created the obligations upon which the judgment of the relator was recovered, existing with her organization complete, having officers for the assessment and collection of taxes, there are parties upon whom the courts can act. The courts, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the municipality, upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, can proceed and by *mandamus* compel, at the instance of parties interested, the exercise of that power as if no such legislation had ever been attempted."

In the case now before the court the officers whose action is sought are present. They were appointed at the beginning, and they have not been changed. They are still acting, and still collecting, not only the tax of five and a half mills imposed by the statute and ordinance of 1874, but, if I read the repudiating ordinance of 1879 aright, a tax of six mills.

Having thus gone over the several positions for which I am contending, I venture to recapitulate and restate them in another form and order. At the head I place these three related propositions: that under the law of nations one State can rightfully prefer a complaint against another for the non-payment of its debts to citizens of the complaining State, or, to use the words of Phillimore: "*The debt so contracted with foreign citizens, whether in an individual or a corporate capacity, constitutes an obligation*

*of which the country of the lenders has the right to require and enforce the fulfillment.* Whether it will exercise that right or not is a matter for the consideration of its private domestic policy"; that the States of our Union have now every right which independent States have under the law of nations, except so far as particular rights, of which there are none involved in the present discussion, have been delegated to the Union or denied to the States by the Federal Constitution; and that the remedy only is changed from force to reason, from diplomacy and armed collision to peaceful contention before this court. Here, I contend, is lodged original jurisdiction of every controversy which one State has, or can have, with another. When two States are before this court, it must decide whether one of them has or has not a just cause of controversy with the other, and the duty of judging between them in every possible case is devolved upon the court. This is the theory of the Constitution; a theory to be recommended rather than gainsaid. It is the only theory upon which the peace of the Union can be permanently preserved. The Constitution does not enumerate the questions to be judged; that would have required a treatise on law, State and Federal, national and international, and the foreknowledge of future transactions. All that our great charter assumes to do, and all that it does, is to provide a tribunal for the adjudication of every question, whatever it may be, now or hereafter, whether it arises between the old States of the confederacy or the new, or grows out of the affairs of a century ago, of the present year, or of a century to come. The court, as I venture to submit, has no discretion whether to accept or to decline the jurisdiction. Whenever one State makes a demand against another State, it must be heard. The decision may be against the demand, but a decision must be made; and to that end the cause must be heard. The great declaration of rights extracted from King John by the barons of England, is as imperative in human affairs now as it was then, and is as appropriate to contentions between our States as to contentions between individuals. "Justice shall not be denied to any one, nor delayed."

After these propositions I place another: "That each State has the right to make itself owner of the claims of its citizens against any other State, and to proceed against it in this court for the payment of such claims. And lastly, independently of the previous propositions, I submit that, being the owner of cer-

tain claims against Louisiana which were provided for by the statute and ordinance of 1874, and which it is the duty of the Board of Liquidation to pay, New York may confidently ask this court to direct the Board of Liquidation to proceed in the discharge of the duty imposed upon it, in respect of which it has no discretion.

It results from these several propositions, if they or either series of them should be deemed well supported, first, that a judgment should be rendered, declaring that the statute and ordinance of 1874 constituted a contract between the State of Louisiana and the bondholders, which could not be impaired by any subsequent act of the State; that the repudiating ordinance of 1879 was a violation of the Federal Constitution, and therefore a nullity; that the State is bound to pay the principal and interest of the bonds; that the fund arising from the tax, or collected by the Board of Liquidation, must be appropriated to the payment of the coupons already due in ratable proportion; that for the payment of interest and principal hereafter to become due, the board must proceed to levy and collect the tax and make the payment stipulated by the terms of the contract, and that the plaintiff may apply at any time hereafter on the footing of this judgment for further instructions, as to any relief to which the citizens of New York may be entitled; or next, if such judgment should be refused, then that one be rendered against all the defendants, directing the payment of the coupons already due; or, lastly, if that should be refused, then, that an accounting be had, to ascertain the amount of taxes collected by the Board of Liquidation, and the amount of outstanding overdue coupons, and that the Board of Liquidation be ordered to pay the proportion due to the plaintiff on coupons already due, and, for any deficiency, it be ordered to proceed and levy the tax necessary to pay the same.

There need be no question about the means of executing the judgment in any of the forms proposed. The first would, in a great degree, execute itself. After its rendition no officer of the State, judicial or ministerial, could find excuse for not doing his duty, and conforming his conduct to the judgment of the court; the second and third would be executed directly against the individual defendants.

It remains now only to answer more particularly than I have done some objections of the learned counsel for the defense. If I should seem to speak of these less respectfully than I might,

I beg to be understood that I have, nevertheless, great respect for the counsel himself ; for do I not know that in the perilous days through which we lately passed, when he put off the ermine he laid it down as pure as he took it up, and that in his after-life he has illustrated the grace of learning and the dignity of virtue ?

One of the objections of the learned counsel is, that the debts of States are debts of honor only ; engagements of imperfect obligation, which the debtors may keep or break at will, without accountability anywhere. This is a strange doctrine to hold, and a stranger to promulgate. In moral philosophy an engagement of imperfect obligation is one which the promissor is not bound by *any sanction* to fulfill. Is the debt of a State one of these ? Is there no sanction for it ? I have poorly performed my part in this argument if I have not shown that a State which promises is bound to perform, and, if the individual to whom it makes a promise can not oblige it to perform, the country to which the promisee belongs can. Was that an imperfect obligation of France which President Jackson threatened to enforce by the fierce process of reprisal ? Were they imperfect obligations which Mexico entered into with English and French subjects, and of which the cannon of Vera Cruz and Puebla demanded the fulfillment ? Were they the imperfect obligations of the Khedive of Egypt, which the arms of England and France are threatening to enforce ? Was it an imperfect obligation of Louisiana, which the court in Macomb's case enforced by injunction ? Can that be called a promise of imperfect obligation, one of the provisions of which is, that to secure its fulfillment "the judicial power shall be exercised when necessary" ? Was that a promise of imperfect obligation which, as the State proclaimed, "created a valid contract between the State and each and every holder of said bonds, which the State shall by no means and in no wise impair" ? Was that a promise of imperfect obligation which expressly declared that "the bonds shall be a valid obligation of the State, in favor of any holder thereof, and no court shall enjoin the payment of the principal or interest thereof or the levy and collection of the tax therefor" ? Was that a promise of imperfect obligation which contained the provision that "the tax required for the payment of the principal and interest of said bonds shall be assessed and collected each and every year until the bonds shall be paid, principal and inter-

est, and the proceeds shall be paid by the Treasurer of the State to the holders of the said bonds, as the principal and interest of the same shall fall due, and no further legislation or appropriation shall be requisite for the said assessment and collection, and for such payment from the Treasury"? The learned counsel reasons in a circle: the promise is an imperfect obligation, he says, because it can not be enforced, and it can not be enforced because it is of imperfect obligation. No matter how the enforcement may be effected, whether by legal process or the procession of armies, the obligation is perfect if it can be enforced at all. Every obligation of one nation to another, under the law of nations, is of perfect obligation; and so are the obligations of the States of this Union toward each other, under the federal compact. The argument of the learned counsel, and I might say the same of the opinion of the circuit judge of the Fifth Circuit in *Elliott's case*, appears to me to rest upon this fallacy: that a State can not by any act, constitutional or legislative, bind itself except in honor. This is as much as to say that the only real significance of the statute and ordinance of 1874 was this: "It is our present intention that the Board of Liquidation shall assess and collect a tax sufficient for the payment of these bonds, but this intention is revocable; we may change our minds, and, if we do, you must then take what we choose to give"! And then what is to come of the solemn declaration, made as if to crown the edifice of the compact, that "the judicial power shall be exercised when necessary"? This means, of course, the judicial power of the State of Louisiana, and the whole of its judicial power, wherever and in whatever courts residing.

Another objection of the learned counsel is, that it is not possible for New York to have a controversy with Louisiana, because the two States are forbidden to enter into an agreement with each other, except with the assent of Congress, and the present suit is upon an agreement not made with such consent. I have already said something with respect to this objection, but I will now answer it more fully. The present suit does not rest upon an agreement between New York and Louisiana. The principal cause of action is the impediment which Louisiana has interposed to the performance by her officers of their duty, under the contracts which she made with her creditors, many of these being citizens of New York. All these contracts she afterward, by a pretended ordinance, repudiated. It is to set aside that re-

pudiating ordinance, and to enjoin the diversion of the funds set apart for the payment of the bonds, to enforce the trust confided to a board appointed by her, and to compel the further performance of their duties, that this suit is brought. Such is the main purpose of the bill. This purpose reaches to all the bonds held by citizens of New York.

There is, however, if this part of the judgment should be denied, another and subordinate one, which would give an installment of relief, and would probably lead to the enforcement of all the bonds, and that is, the demand for the payment of the overdue coupons, out of the trust funds in the hands of the Board of Liquidation, or which could be placed there by the due performance of its duties. If, with respect to this last demand, the question of an agreement between New York and Louisiana is raised, there are several answers. One of them is, that the transfer of the coupons constituted no agreement whatever between the maker and the bearer. These coupons are promissory notes payable to the bearer. The promise is altogether one-sided. Louisiana promised to pay a certain sum at a certain time to the bearer of the paper, whoever it might be. The bearer promises nothing. Agreement means strictly a mutual transaction where both parties do, or agree to do, something. The coupon is rather the end or outcome of an agreement than the agreement itself. Chitty, in the very first sentence of his "Treatise on Bills and Notes," says, that a bill of exchange "was in its origin the mode of completing the *previous* distinct contract of exchange or bargain between A and B at one place, that A would cause money to be paid to B or his assign at another place, by C, a third person, a debtor to A, or supplied by him with value to the amount." A bill of exchange, as between the acceptor and the holder, is like a promissory note.

But let it be supposed that the holding of the coupons did create an agreement between the maker and the holder, it was not such an agreement as the Constitution forbade to be made, without the consent of Congress. Most certainly the Constitution does not extend to every kind of agreement. If, in a suit pending between two States, a stipulation should be entered into respecting a commission abroad, or the admissibility or effect of certain evidence, or any other incident in the conduct of the suit, it surely would not be thought necessary to get the consent of Congress. The reason of the intervention of the Attorney-Gen-



eral in Florida against Georgia was, that something might be done between them which would affect the General Government. The commission appointed by New York and New Jersey to establish the boundary between them on the Hudson was, I think, agreed to without any previous consent of Congress, and indeed without the consent of Congress at all; though the final settlement was assented to, for the obvious reason that an agreement respecting a boundary is one of those which affects political relations. The judgment in *Missouri against Iowa*, 7 How., 660, was not ratified by Congress, if I am correctly informed.

If I might venture on a definition of the agreement intended by this clause, it would be this: an express agreement affecting the political relations of the States. An implied or incidental agreement could hardly have been intended, because there was no reason for it, and because such a one can hardly be avoided in the relations of States with each other, any more than it could be avoided in the mutual relations of individuals. Nor is it to be supposed that an agreement of a purely commercial character could have been intended, because there was no perceptible motive for it. An "entangling alliance," or some agreement which would affect the political relations of the States with each other, should seem to be alone within the reason of the provision.

This clause of the Constitution has not been much considered by the courts. Story, in his "Commentaries on the Constitution," section 1403, says:

"The latter clause, 'compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of States bordering on each other. Such compacts have been made since the adoption of the Constitution. The compact between Virginia and Kentucky, already alluded to, is of this number. Compacts settling the boundaries between States are or may be of the same character. In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national Government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief."

In *Rhode Island vs. Massachusetts* the opinion of the court contained this remarkable passage (12 Peters, 743):

"Then came the Constitution, which divided the power between the political and judicial departments, after incapacitating the States from settling their controversies upon any subject, by treaty, compact, or agreement; and completely reversed the long-established course of the laws of England. *Compacts and agreements were referred to the political, controversies to the judicial power.* This presents this part of the case in a very simple and plain aspect. All the States have transferred the decision of their controversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the Confederation of 1781 and 1788; that we should do that which neither States nor Congress could do, settle the controversies between them. We should forget our high duty to declare to litigant States that we had jurisdiction over judicial but not the power to hear and determine political controversies. . . . We should equally forget the dictate of reason, the known rule drawn by fact and law, that from the nature of a controversy between kings or states, it can not be judicially that where they reserve to themselves the final decision, it is of necessity by their inherent political power, not that which has been delegated to the judges as matters of judicature, according to the law. These rules and principles have been adopted by this court from a very early period."

And in *Florida vs. Georgia* the opinion of the court, delivered by Chief-Justice Taney, has the following :

"And if Florida and Georgia had, by negotiation and agreement, proceeded to adjust this boundary, any compact between them would have been null and void, without the assent of Congress. *This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States which might affect injuriously the interests of the others.*"

The fact of investment by the States in the securities issued by the others is of itself evidence of a practical construction of the constitutional provision. That the practice has been general and long continued may easily be seen by examining the statutes of the different States. I have already quoted the latest statutes of Massachusetts. The assent of Congress may be implied as well as expressed. So said this court in *Holmes vs. Jennison*. But, after all, the only reasonable construction of the constitutional provision is, that it prohibits express agreements only, such as independent States are accustomed to make with each other, and not to such relations as follow from the transfer of negotiable paper.

My learned friend argues as if he thought it a great humiliation for a sovereign State to be answerable for its engagements

before any tribunal. Is it not rather a humiliation to refuse to answer? What does a refusal mean? It means that you will not allow any one to judge of you but yourself. This is the height of arrogance, as it is the height of injustice. If a man can not be a just judge in his own case, no more can a personal sovereign or a sovereign State. The immunity from suit is a feudal privilege, born of the times when the few were masters and the rest were slaves. It has no place in modern ideas, nor indeed in modern practice, if we except two Governments, one the freest and the other the least free among civilized states. Of all the nations of the earth the United States of America and Russia are the two exceptions.

A State, which is an aggregation of individuals, is no more exalted above prejudice and passion than the individuals who compose it, and it is quite as unjust, quite as savage, quite as cruel for the State to say, "I will be judged by no one but myself," as it would be for an individual to say it. The truest, the noblest rule—the only true and noble rule—is that all are equal before the law; the individuals, the minor corporations, which are minor aggregations of individuals, and the great corporations, the States, which are the aggregations of all the individuals of the Commonwealth.

The greatest of all the functions of government is to do justice, and justice is to render to every man his own. To refuse to the judges of the land the function of rendering justice between the citizen and the State is virtually to deny that they are capable of doing it, and if so they must be incapable of doing it between citizen and citizen.

The learned counsel relies very much on some English cases, and especially on *Twycross against Dreyfus*, as if to show not only that a foreign state can not be sued in an English court, but that a fund appropriated by such state to the payment of a particular debt can not be reached by English process. That an independent State can not be sued in the courts of any country but its own, is one of the maxims of the law of nations, resulting from the principle of the equality of States. For this reason, one State is not amenable to the jurisdiction of any other State or of its judges. As to the means of reaching a fund appropriated to a particular purpose, that is another question, which depends altogether upon the domestic law, and on the point whether the fund can be reached without impleading the sovereign. As

to the latter, it is sufficient to say here that the law of England, whatever it may be, can have no application on the question of the liability of a State to be sued.

Twycross's case is claimed by the defendants' counsel to be similar to the one before the court. But there is no real similarity. In that case the plaintiff, it is true, was the holder of bonds of the Peruvian Government. It is also true that this Government had printed on each bond the following statement :

"As a guarantee for the fulfillment of the obligations contained in this bond, the Government of Peru, under the national faith, pledges the general revenue of the republic, and especially the free proceeds of the guano in Europe and America, after the engagements which it has contracted on them are covered, the proceeds from the railways from Arequipa to Puno, etc., and the free revenue of the working thereof, and the receipts of the custom-houses of the nation."

Vice-Chancellor Hall said, in his opinion, that—

"I need not say that in this case an action upon the bond against the Republic of Peru for recovering from the republic the amount of the bonds, is entirely out of the question. No such action as that could be maintained."

Again :

"Then considering that as the original position of each of the plaintiffs, what is there beyond which it is important to consider? There is a prospectus set out upon the faith of which the plaintiff says he subscribed."

Again :

"The bondholder, the person who has the benefit of this engagement, is to go to the Government and say, You have engaged that after certain payments have been made, you will, out of what may be in your hands applicable for the purpose, set aside a sum sufficient for the service out of it."

Again :

"It is not sent to them as a fund to be treated and set apart and dealt with as a fund in their hands, so as to create any relation whatever between them and the bondholders. There is no trust impressed upon it, no equitable assignment created by the transaction which is there represented, taking it to be truly represented; therefore, that being so, there is neither trust nor equitable assignment in the case, and it does not even approach the case of Gladstone against Musurus Bey, where there was a sum actually deposited by actual contract for a special and particular pur-

pose between the parties, and which sum the court thought it could deal with."

Upon appeal, the Master of the Rolls said :

"How can any rational person call that a mortgage or pledge which is preceded by the right of the pledgor to appropriate as much of the property as he pleases to any purpose he thinks desirable for his own use? It is impossible to look upon that seriously as a pledge. It is so much as the Government chooses to leave them after satisfying the ordinary engagements and wants of the Government."

The case of the *Parlement Belge* has been cited with great emphasis. But the following extract from the opinion of the Judges of Appeal in the case shows that it does not help the defendants :

"We are of opinion that the proposition deduced from the earlier cases in an earlier part of this judgment is a correct exposition of the law of nations, namely: that as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or *over the public property of any state which is destined to its public use*, or over the property of any ambassador, though said sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

In the case of Gladstone against Musurus Bey before Vice-Chancellor Page Wood (1 H. and M., 495) an injunction was granted to restrain the Bank of England from parting with funds claimed to belong to the Sultan of Turkey. In the course of his opinion, the Vice-Chancellor said :

"If the bonds were the absolute unqualified property of the Sultan, that is to say, of the Turkish Government, there might be some difficulty in attempting to enforce any claim against the Sultan by attaching this fund. You can not proceed against the Sultan's property by way of arrest, so as to bring the sovereign within the jurisdiction of the court, or by way of execution or the like; but that is not what this bill asks. The shape in which the case is put by the bill is that this property, in the eye of the court, is not the property of the Sultan; that it is a fund *in medio*, which is in one contingent event to become the Sultan's property, and in another contingency to become the plaintiff's; that it is, therefore, a fund in which both the Sultan and they have contingent interests. It is in effect exactly analogous to the case put by Lord Langdale in his judg-

ment in Duke of Brunswick against King of Hanover, 6 Beavan, 39, though arising in a different form."

In Morgan against Lariviere, 7 H. L., 423, where the question was whether a banker's letter of credit created a trust, it was stated by the Lord Chancellor Cairns, p. 430, that—

"No doubt, under such circumstances, the court having a trust fund under its control, might well proceed to administer that fund, even though a foreign government might be interested in it, and might not be before the court, or subject to the jurisdiction of the court."

And again, at page 432 :

"What is there in this letter which constitutes an equitable assignment, or what is there in it which impresses with a trust any particular sum of money?"

In the case of the Charkieh, L. R. 4 A. & E., 59, which was a case of collision between a Dutch ship and a vessel of the Khedive of Egypt, it was held that the Khedive was not entitled to the privilege of a sovereign prince, and that "on the assumption that he was entitled to such privilege it would not oust the jurisdiction of this court in the particular proceeding which has been instituted against this ship."

Sir Robert Phillimore, in the course of his judgment, referred to two decisions of Judge Story, reported in Sumner, and made this observation, page 93 :

"I think, therefore, that I am not prevented from holding what it appears to me the justice of the case would otherwise require, that proceedings of this kind *in rem* may in some cases at least be instituted without any violation of international law, though the owner of the *res* be in the category of persons privileged from personal suit."

Then again, on page 97 :

"The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice in cases where such use would lessen the dignity or embarrass the functions of the representatives of a foreign state; and, if the suit takes a shape which avoids the inconvenience, the object both of international and of ordinary law is attained—of the former, by respecting the personal dignity and convenience of the sovereign; of the latter, by the administration of justice to the subject."

According to this decision, it is not improbable that a suit against one of our States would be entertained in an English court, and its property seized and sold.

The principle sought to be deduced from the English cases is : First, that a sovereign can not be coerced even to the fulfillment of his engagements, and, as a corollary therefrom, that his property can not be taken from him by legal process. The principle is not applicable to the present American case, for three reasons : first, because an American State *can* be coerced at the suit of a proper plaintiff ; secondly, because the property of an American State can be taken from it at the suit of any plaintiff, if he establishes his right to the property, and the State can not be made a defendant ; and, thirdly, because as it respects the fund already collected by the Board of Liquidation (being the proceeds of the five and one-half mills tax), it is not the public property of the State of Louisiana, but the private property of the bondholders ; and as it respects the fund that may be hereinafter collected by the same board, it is collectable from citizens of Louisiana, not by the exercise of new legislation, but just as if after the passage of the funding statute and ordinance of 1874, and the appointment of the Board of Liquidation, the Legislature and the convention had adjourned for forty years.

The distinction sometimes taken between coercing a defendant as a private person and not as a State officer, savors too much of the dialectics of the school-men. There never yet was a mandamus issued to a defendant to assess and collect a tax, but it was issued to him as an officer of a State. Mr. Madison was proceeded against as Secretary of State of the United States, and not as a citizen of Virginia. Mr. Kendall was proceeded against, not as Amos Kendall, but as Postmaster-General. In McComb's case, the injunction was granted against the defendants, not as individuals, but as the Board of Liquidation of the State of Louisiana.

The case of McCauley against Kellogg, decided by Mr. Justice Woods, is consistent with these principles. It was a suit in equity by a private person against officers of the State to compel them to "execute the statutes of the State by estimating, levying, collecting, and applying to the payment of the bonds the tax originally provided by law for the payment of the interest, and the redemption of the principal." The act under which this injunction was asked had provided that "the Auditor of Public Accounts should, at the end of each year, estimate what sum levied

upon the entire taxable property of the State would be sufficient to pay the interest on all bonds issued by the State, and that the sum so ascertained was thereby annually levied upon the taxable property of the State; that the tax so levied should be collected as other taxes, and should be known as the 'Interest Tax,' and when paid into the Treasury should be credited to a fund to be called the 'Interest Tax Fund,' and should be held sacred for the payment of the interest upon the bonds of the State." This act had been repealed by the funding act and ordinance of 1874, which, it was claimed, were void.

The learned counsel does not intend, I am sure, to make an apology for repudiation, but then I would ask, why gather together and present to the court the records of the frauds of by-gone ages, the instances of debased coin, the abuse of paper money convertible into coin only at an enormous depreciation, and the open repudiation of the most solemn obligations? As well recount all the cruelties of the ancients or of the middle ages, the sack of Magdeburg, the ravage of the Palatinate, the butcheries of Cordova, the massacre of St. Bartholomew, the storming of San Sebastian, as an excuse for barbarities of to-day.

A successful and triumphant fraud, bad and cruel as it may be in its direct consequences, is made worse by its evil example. To teach the people of a country that a State may enter into the most sacred engagements and yet flout them with impunity in the face of its creditors, is to teach them that dishonesty, to be profitable, needs only to be powerful. With such a lesson and such an example, how can the citizen be expected to practice the virtue which the State teaches him to disdain? What should he think of the sanctity of laws when the lawgiver breaks them at will? What will he think of honesty when his State teaches him dishonesty?

We do not sufficiently reflect on the disturbing elements of repudiation. In this busy and practical age, when public securities flood the land and everybody deals in them, there will be agitation, discontent, and struggle, until it is finally decided that for the monstrous and shameless wrong of repudiation there is an effectual remedy. Slavery was a disturbing element which had to be put down before we could have peace. So must repudiation be put down, or it will put us down.

The learned counsel finds fault, not only with New York and her citizens, for daring to ask for the payment of their dues,



but with former judgments of this court, and, as it should seem, even with the Constitution itself. The prohibition to legislate in such manner as to impair contracts is slightly spoken of ; the decision in Chisholm's case is sneered at, and the opinions of the judges are characterized as "mistaken and erroneous," and it is said that "one can not read them now without wonder that they could have been conceived."

Of the State and citizens of New York, seeking here to recover only what the State of Louisiana has solemnly pledged herself to pay, it was scarcely possible to write or speak in terms of greater disparagement than the learned counsel has written in his briefs and spoken in his oral argument. Plutocrats, hucksters, jobbers in stocks and securities, champertors, *chevaliers d'industrie*, are some of the epithets heaped upon the holders of Louisiana bonds. And the sovereign States of New York and New Hampshire, which have always paid their debts and obeyed the Constitution, which have never been dishonest or disloyal, which won their independence with the sword, and greatly helped to establish this union of the States, when Louisiana was a feeble vassal of Spain, and a score of years before it was sold to us—of these States the following language has been thought befitting :

"Heresy, schism, apostasy, blasphemy, and infidel publications are wolfish. The Inquisition, the rack, the *auto-da-fé*, are methods of indirect action. New York and New Hampshire seem to have attained to a full appreciation of the latent forces to be found in indirect action and to a purpose to employ it. They seemed determined to collect into their fold their unsuspecting and fearful lambs from their innocent and delightful pasturage within the stock exchanges which abound in those States."

One who could have seen, as I saw, the late Chief-Justice of this court, then Secretary of the Treasury, pleading with the merchants and capitalists of New York for the loan of their money to the Government upon its bonds, to aid in putting down the rebellion, and the prompt, unselfish, generous way in which they answered his call, would never think of calling the lenders of money to a Government in its distress, plutocrats, hucksters, jobbers in stocks and bonds, *chevaliers d'industrie*. He would have thought and said that they who thus aided the Government with their treasure, poured out with lavish hands, at the risk of losing all if the great cause failed, were to be, not cursed, but thanked, by the side of that "army with banners" which carried us so bravely through. Is it not possible that they who lent money to

Louisiana had some generous thoughts, and were moved by creditable motives? Is it incredible that they who in the markets and exchanges of the world deal in the stocks and bonds of governments are endowed with honorable sentiments in as great measure as the sugar-planters, rice-growers, and field-laborers of Louisiana?

I can not close this argument without adverting to the moral aspects of the case; not that I would have it judged by any other test than that of the Constitution and the laws, but that I invoke the spirit of the Constitution as its best interpreter. This great compact is instinct with good faith. That is the breath of its life. The citizens are taught to lean on and confide in each other. None know better than you, our judges, before whom is spread the history of the law, not less than its precepts, what a shock an open, defiant, triumphant repudiation, by one of our States, of its solemn engagements, must give to our whole moral, social, political, and legal system. These States are bound together by ties that can never be broken. If one bears a tainted name or the stain of evil deeds, she will harm the good name of all the rest. Her example is an invitation to every one of her own citizens, and indeed to the citizens of all to do likewise—to deceive, to cheat, and to betray.

A great tribune of England described faith as that which "holds the moral elements of the world together." It holds them, as the law of gravitation holds the physical elements, without which chaos would be universal. The absence of faith is the disintegration of society; an approach to that period when the nearer one gets to his neighbor, the more he wishes to get away from him; when the worst foes of a man are those of his own household, even the wife of his bosom and the children of his loins.

I appeal to you, supreme judges of the land, pre-eminent in dignity, in honor, and in power; I appeal to every lover of his country; to every true son of Louisiana, and there must be many such, though overborne for the moment by an ignorant and thievish multitude; I appeal to the learned counsel himself, who, I am sure, abhors in his inmost heart the perfidy which he is obliged to defend; I appeal to all, to lead us out of this valley of humiliation, to help us blot this ordinance of repudiation and shame from the book of the laws of Louisiana, from the pages of history, and from the memory of men.

ADDRESS BEFORE THE LAW REFORM SOCIETY,  
JANUARY 30, 1883.

MR. PRESIDENT AND GENTLEMEN : When I received last Friday your invitation to address you on the occasion of this your first regular meeting, I feared that by reason of previous engagements I should not be able to arrange properly what I should say ; and even now I must beg you in advance to excuse any deficiencies which you may observe.

A code is a digest of the law on a given subject or class of subjects, analyzed, condensed, stated in distinct propositions, and arranged in scientific order. It is thus a comprehensive statute. Most of our law is or was, as you know, what is sometimes called unwritten law, sometimes case law, sometimes judge-made law. It is described by Tennyson as

“ That codeless myriad of precedents ;  
That wilderness of single instances.”

In this condition nobody but a trained lawyer can find it out, and even he is bewildered as often as he is led aright. He gropes about in search of these single instances, these precedents, and finds them, good and bad, right and wrong, in hundreds or thousands of volumes, sometimes agreeing with each other, sometimes disagreeing. He never feels safe until he has read the last book of reports of the court of last resort, and even then he is not sure but that in the next book that comes out he will find the case he relies upon qualified, distinguished, doubted, or overruled. In the last volume of the reports of our own Court of Appeals, the eighty-eighth, containing the decisions from February 8, 1882, to April 18, 1882, two months and ten days, are to be found 123 decisions in all, and these contain criticisms upon forty-nine previous cases as reversed, distinguished, etc. The number of cases cited in the opinions is 492, and in the arguments of counsel 5,037. The twelfth case in the volume gives 165 citations, of which eighteen were from England, one from Maine, two from New Hamp-

shire, seven from Massachusetts, one from Connecticut, twenty-four from New York, one from New Jersey, eleven from Pennsylvania, six from Delaware, two from Virginia, one from North Carolina, seven from Georgia, seven from Alabama, two from Mississippi, one from Louisiana, two from Texas, one from Arkansas, two from Michigan, three from Minnesota, five from Kentucky, five from Ohio, eight from Indiana, seven from Illinois, three from Iowa, nine from Missouri, one from Kansas, two from Nebraska, six from California, and fifteen from the courts of the United States. The eighty-third case in the same volume gives 234 cases as cited by counsel—cited, be it remembered, as precedents and guides for New York judges administering, or rather I should say making, law for the State of New York. Thus we have in one volume, the product of little more than the sixth part of a year, 123 decisions, and these for the most part evolved from 5,037 cases that went before, painfully sought out of hundreds and thousands of volumes. Is not this a state of things appalling to the profession, and still more appalling to the public? Is it any wonder that Hallam should have written: "Nor is there any reading more jejune and unprofitable to the philosophical mind than that of our ancient law books. Later times have introduced other inconveniences, until the vast extent and multiplicity of our laws have become a practical evil of serious importance, and an evil which, between the timidity of the Legislature on the one hand and the selfish views of practitioners on the other, is liable to reach in no long time an intolerable excess. Deterred by an interested clamor against innovation from abrogating what is useless, simplifying what is complex, or determining what is doubtful, and always more inclined to stave off an immediate difficulty by some patchwork scheme of modifications and suspensions, than to consult for posterity in the comprehensive spirit of legal philosophy, we accumulate statute upon statute and precedent upon precedent till no industry can acquire nor any intellect digest the mass of learning that grows upon the panting student, and our jurisprudence seems not unlikely to be simplified in the worst and least honorable manner—a tacit agreement of ignorance among its professors." ~~Or that~~ Amos should have written: "But for a youth yet unformed by any other course of accurate study, it may safely be said that the study of English law in its present shape is the most distorting, noxious, and mentally paralyzing mode of education that the most injudicious and cruel

instructor could devise." Or that Herbert Spencer should have written: "Until now, that county courts are taken away their practice, all officers of the law have doggedly opposed law reform. Dare any one assert that, had constituencies been always canvassed on principles of law reform *versus* law conservatism, ecclesiastical courts would have continued for centuries fattening on the goods of widows and orphans? . . . The complicated follies of our legal verbiage, which the uninitiated can not understand, and which the initiated interpret in various senses, would be quickly put an end to."

Such is case law and the administration of case law. What is the substitute for it? The law of the Legislature; law made by those who alone have the right to make it—the lawgivers; in other words, a code. The practicability and expediency of a code have been so much discussed of late that I need only refer to two or three publications. A pamphlet lately published contains one of the letters of Jeremy Bentham to the people of this country, and a report of Judges Story, Metcalf, and others, on the practicability and expediency of reducing to a written and systematic code the common law of Massachusetts. Pollock, in his "Essay on Jurisprudence and Ethics," published within the year, has a chapter on the science of case law, concluding with these words: "A good part even of our statute law may be regarded as consolidated case law. This consolidation, commonly treated as one of the minor functions of legislation, is in truth one of its highest. On a large scale it is codification, and inasmuch as I found when this essay was first published that some of its expressions were liable to be perverted by enemies of codification to uses they were never meant for, it may not be amiss now to say that I am a strong believer in codification, and have given my reasons for it in some detail elsewhere." Judge Thompson of Missouri has just published an article in "The Western Jurist," from which I make this extract: "We are in favor of a code, because we prefer a certainty to that which is uncertain; because we desire to see that law which it is claimed is founded upon the 'immutable principles of justice' reduced to positive enactments; because there is much in the common law which is unsuited to our present civilization, and which we shall never get rid of except by codification; because from the 'elasticity' of the common law flow an innumerable train of evils; and, finally, because codification means a decrease in litigation, a saving of labor for the judge and the

practitioner, and greater security to the rights of the individual. It has been argued that the time has not come for codification in Iowa; but, however that may be, it does not follow that the time has not come in New York. We confess that in this, as in most of the new States, the peculiar features of the country, the habits of our people, and the customs in some lines of trade, may create rights and bring about a development of law which it would be impossible now to foresee and make provision for; but Iowa has been permitted to enjoy a foretaste of codification through the complete reduction of some branches of her law to statutory provision, and before she is half as old as New York she will have a code. What we say upon this question is with regard to codification in general. We do not see why a code should interfere with the 'theoretical and historical study of our law'; if this age 'is not capable of producing a great work' in jurisprudence, the production of as good a one as it is capable of will not interfere with the production of a greater in another. A code will always be open to amendment or revision whenever in the wisdom of succeeding years it shall be shown to be defective, or a revelation of new rights or a change in our civilization shall require it. In this regard the 'elasticity' of a code will be greater than that of the common law."

Passing from these views of codification in general, let us now see what has been done and what remains to be done for codification in the State of New York. The Constitution of 1846 made two special provisions for codifying the law through what are generally known as the Practice and Code Commissions; the former for remedial and the latter for the substantive departments of the law. Both commissions performed their allotted tasks and reported to the Legislature—one, codes of civil and criminal procedure, and the other the political, penal, and civil codes. These five codes embraced in their scope the whole body of the law. The Legislature having acted upon the reports of the practice commissioners and adopted codes of procedure, civil and criminal, we may confine ourselves here to the work of the Code Commission. The provision of the Constitution under which it was appointed required that three commissioners should be appointed, whose duty it should be "to reduce into a written and systematic code the whole body of the law of this State, or so much and such parts thereof as to the said commissioners shall [should] seem practicable and expedient," and the statute which appointed the

commissioners by whom the codes of substantive law were prepared, provided that the work should be divided into three codes—the political, the civil, and the penal. The reports made by this commission to the Legislature were conformable to the Constitution and the statute. The political code, being chiefly a compilation of existing statutes, has not been pressed upon the attention of the Legislature, because the consideration of the others was more important. I shall therefore leave the former out of view, and ask your attention to the civil and penal codes alone. The last became a law, and went into effect on the 1st of December last. The former has passed the Assembly four times and both Houses twice, but failed of becoming a law by the refusal of the Governor's signature.

You know what these codes contain; let me tell you how they were made. And first of the Penal Code. A careful analysis was prepared, communicated to the Legislature, and distributed through the State. Then a draft was made. This, too, was communicated to the Legislature and distributed. After that, all criticisms and suggestions were considered. Night after night the commissioners met at each other's houses and re-examined carefully every section, every line, and every word; and finally, in December, 1864, they reported to the Legislature the code as completed. In a preliminary note the commissioners explained the plan of the work and the leading objects they had in view, acknowledged the assistance rendered them by many gentlemen of the profession in this State and elsewhere, who had contributed suggestions toward the perfection of the work, mentioning especially Mr. Greaves, of the English bar, a commissioner for the amendment of the statute law of Great Britain, as one to whom they were under special obligations for a careful and painstaking examination of their draft, enabling him to make many suggestions toward its improvement. The code thus reported, though occasionally brought to the attention of the Legislature, and once referred to the Judiciary Committee of the Assembly, which undertook its examination, remained nevertheless unacted upon until the report in 1879 by the late commissioners to revise the statutes of an act relating to crimes and punishments brought the Legislature again face to face with the question of codification. Then it became necessary to decide between patching up the old statute law of crimes or codifying the whole criminal law. The Legislature decided, and I think wisely, in favor of the lat-

ter. A special committee of the Senate re-examined the work, and received the assistance of six members of the bar. The committee reported back the code with a recommendation for its adoption. It was then passed by both Houses, but so late in the session that the Governor had thirty days within which to give or withhold his signature, and he withheld it, without giving his reasons. In the next session it was passed by the Assembly, but failed in the Senate. In the third session it passed both Houses and received the approval of the Governor, to take effect after the next session. The next session brought suggestions of amendments from different parts of the State, all of which were considered by the committees of the two Houses in joint or separate session, and a considerable number of them were adopted. The result is that the Penal Code now stands as the law of the land, and, together with the Code of Criminal Procedure, presents the whole law of crimes, punishments, and practice in criminal cases. It has been assailed with a vehemence and malignity which would have surprised me had I not remembered the greater vehemence and malignity with which the Code of Civil Procedure was assailed when, in 1848, it was first promulgated, and remembered also that the object of so much abuse has by the force of its example alone made its way around the world.

Yet I do not say that the Penal Code is perfect by any means. I have often had occasion to repeat the language of Macaulay in the introduction to his Indian Penal Code, and it will do to repeat it again: "To the ignorant and inexperienced the task in which we have engaged may appear easy and simple, but the members of the Indian Government are doubtless well aware that it is among the most difficult tasks upon which the human mind can be employed; that persons placed in circumstances far more favorable than ours have attempted it with very doubtful success; that the best codes extant if malignantly criticised will be found to furnish matter for censure in every page; that the most copious and precise of human languages furnish but a very imperfect machinery to the legislator; that in a work so extensive and complicated as that on which we have been employed there will inevitably be, in spite of the most anxious care, some omissions and some inconsistencies; and that we have done as much as could reasonably be expected from us if we have furnished the Government with that which may by suggestions from experienced and judicious persons be improved into a good



code." The reproaches that have been cast upon the commissioners and the Legislature are as unjust as they are reckless. The Legislature has at last done all that it could have been expected to do. It has obeyed the commands of the Constitution, and in doing so has taken up and carried through a work prepared by commissioners under the Constitution and the laws. It has sought advice and assistance from every available quarter. A Legislature, be it remembered, can enact a code ; it can not make it, any more, as Sir James Stephen has said, than it can paint a picture. For that very reason the Constitution provided for the appointment of commissioners to prepare the code. The commissioners performed their function, with what care and labor, what self-sacrifice, none but themselves can tell. The Legislature performed its functions also with all the aids it could get. There is not time now to go into details. Suffice it to say that I have as yet seen no criticism which can not be easily refuted ; but that, forasmuch as the law is the "State's collective will," if any provision of this code needs amendment, and the State through its Legislature shall express its will to that effect, it shall be my humbler function to help, if my help should be desired, to formulate the expression of that will.

And now for the Civil Code, the most important of all. It embraces the laws of personal rights and relations, of property and of obligations. It was framed with the greatest possible care, during eight years. Every section was studied, and not a few of them written and rewritten many times. It has been four times passed by the Assembly and twice by both Houses of the Legislature. The criticisms made upon it are generally so insignificant, so trivial indeed, as to be amusing. I will give you two instances, one denouncing the section which declared the law of nations to be a part of the common law ; the other denouncing the definition of a contract as being an agreement to do or not to do a "certain" thing instead of a "particular" thing. The answer to the first is the declaration of Lord Justice Brett in the 5 L. R. Pro. Div., 198 : "The international law is a part of the common law of England" ; the answer to the second is the declaration of Chief-Justice Marshall, in *Green against Bidle*, 8 Wheat., 1 : "If we attend to the definition of a contract, which is the agreement of two or more persons to do or not to do certain acts." When we find such objections put forth by learned critics we may safely refuse to pay further attention to

any objections they may make. Better than all criticism, however, for or against, is experience. This code has been tried. It has been put to a test severer than the studies of scholars or the opinions of judges. It was enacted in California in 1873, with such few changes as were necessary to adapt it to the situation of that State, and it was thoroughly revised in 1874. We have the aid of that revision and have profited by it. The California revisers used this language: "We found the four codes, the Political Code, the Penal Code, the Civil Code, and the Code of Civil Procedure, as prepared by the commissioners and enacted by the Legislature, perfect in their analysis, admirable in their order and arrangement, and furnishing a complete code of laws, the first time, we believe, that such a result has been achieved by any portion of the Anglo-Saxon or British races. It seems inexplicable that those people who boast of being the most fully imbued with the sentiment of law have left their laws in the most confused condition, resting partly in tradition, but for the greater part scattered through thousands of volumes of books, of statutes and reports, and thus practically inaccessible to the mass of the people."

An attempt has been lately made to diminish the value of this California experience by extracts from the letter of a prominent lawyer of that State. That letter surprised me, and led me to seek further information from the bench and bar of California. I have now such a mass of evidence as should satisfy every candid person. Here, for instance, is an extract from a letter of Mr. Justice Sawyer, the present Circuit Judge of the United States for the Pacific coast. His letter is dated the 28th of December, 1882, and the greater part of it is as follows: "So far as my observation extends, the codes have all worked well in this State. The civil, political, and criminal codes all went into operation January 1, 1873. This was three years after I ceased to be Chief-Justice of the Supreme Court of the State and became the United States Circuit Judge for the Ninth Circuit. Since I have occupied the position of United States Circuit Judge the class of questions litigated has been to a great extent different from those generally arising in the State courts, and I have had much less to do with State statutes and not so favorable an opportunity for observing the practical operation of the codes. But, so far as my experience and observation go, the result seems decidedly favorable to the codes, and I think such is the view of

our leading lawyers and State judges. I have spoken to several attorneys upon the subject, and this is the view generally expressed. It really seems remarkable to me that changes could have been made, however desirable, without producing temporary inconvenience. The fact that so little inconvenience resulted argues well for the codes. Of course, it is impossible, in view of our limited intellectual powers, to provide specifically for every conjuncture of circumstances that is possible to arise, but as to the great body of the laws the codes present a more definite, concise, specific, and unmistakable statement of the laws in force, which is also more readily found and understood, than is possible to be found in the common-law system, independent of codes. If a case arises which is not clearly provided for, the courts will of course, as heretofore, be compelled to determine the case upon its nearest analogies, and even to resort, perhaps, to the analogies of the common law. As for myself, I should not hesitate to adopt the codes. I think it would simplify the laws and greatly facilitate their administration."

In January, 1882, a memorial was presented to Congress from American residents in Japan, asking for the extension of American laws over them, and closing as follows: "Your petitioners would respectfully suggest the codes of the State of California as appropriate to that end, and as suitable, *mutatis mutandis*, to the needs and requirements of Americans in Japan and China."

Let me close my address with this observation, that standing here the only survivor of the commissioners by whom the Civil Code was framed, and not only speaking for myself but representing what I am sure would be their wishes if they were living, I shall welcome, as I have always done, any suggestions of amendments which my brethren may make, and I shall feel gratified if this society of law reformers will appoint a committee for such a purpose.

## THE SMOKE-NUISANCE.

Article in "The Continent," October 24, 1883.

"USE your own so as not to injure another's," is a maxim of our law. In another form, more used in common speech, it is, "One's rights end where another's begin." This is no less a rule of courtesy and social convenience than of positive law. The purpose of the present paper is to call attention to one violation of this rule which causes much discomfort to many persons, and has grown to be a great social evil.

Smoking tobacco may be a good thing or a bad thing for the smoker. We will not enter much into that question. What is insisted upon is that he has no right to annoy another with it. It may, for aught I know, add to his power of digestion, or he may think that it sweetens his breath, or imparts a favorite perfume to his clothing, or it may soothe his nerves and soften his temper; but these do not clothe him with the privilege of blowing his smoke into my face or into the air so near me as to reach my mouth and nostrils. My right not to have his smoke is as great as his can be to have it.

That every one of us has the right to breathe the air, and to breathe it as the Dispenser of all good has made it, will hardly be disputed. How, then, does it happen that this right is so often and so rudely infringed? Is it because the indulgence of the appetite has blunted the edge of that delicate sensibility which feels for others, or extinguished that love of justice which would yield to every one the full measure of his rights, or that readiness of self-denial which would rather abridge something of one's own happiness in order to increase the happiness of another?

Going the other day up the lift which leads to my office, I remonstrated with a man who was smoking in the little box, four and a half by seven, where six or eight persons were wedged in. He merely replied that if I did not like smoking I had better walk up the stairs! What sort of a creature should one take this man to be? That he had the manners of a savage with the heart of a brute is evident enough. What can he be in his own

family or in the society which he frequents, if any society will have him, or in his club, if he has been admitted to one? He might have been captain of a slave-ship in the old slave-traders' days, or the overseer, without mercy or remorse, of the plantation described in "Uncle Tom's Cabin."

Smoking has invaded legislative bodies—not merely the committee-rooms, but the halls of legislation. I have seen in the House of Representatives members smoking in their seats. It is prohibited by the rules; but the laxity which prevails in the enforcement of law in general prevails here. The Speaker sits quietly by and sees it going on. The Sergeant-at-Arms evidently winks at it, and his assistants wink, of course, when he winks.

The practice has not yet invaded the courts; but it is not easy to see why it should not, for the places where the laws are administered are no more sacred than the places where the laws are made.

The steamers and railways are in a manner taken possession of. Let me relate an occurrence on one of the Cunarders the summer before the last.

The steamer was full; the weather was hot; we had to sit on deck most of the day, or be half stifled; the seats, all taken, were crowded together; some passengers sea-sick, some reading, some regarding the sea with that look of weariness which made them seem to wish often and often that the voyage were over. Nothing was wanting to the completeness of the picture but the smoker, and he came sure enough, not stealthily, as if he would say, "With your leave," but boldly, cigar in one hand and match in the other, proffering a foretaste of brimstone before the surfeit of tobacco. In half an hour you might count a score or so of men engaged in the same pleasing performance, forsaking in their selfishness the smoking-room set apart for them. Now and then some one ventured with a sigh or a look to express disapprobation. But no matter; the captain saw it; no one interfered. The captain was spoken to. He said he would gladly stop the practice, but could not, though he knew that smoking in the state-rooms endangered the safety of the ship. Finally a large number of the company sent him this letter:

"The undersigned, cabin-passengers, who are annoyed by smoking near them when on the deck, venture to ask that some part of the deck may be designated where they may be able to sit without the annoyance of tobacco-smoke."

Next morning the following was posted at the forward end of the ladies' saloon :

"The non-smokers, having made a request of the captain for a portion of the ship to be assigned to them, the smokers will please not smoke abaft this."

This mild request was not interpreted as an order. Most of the smokers respected it, however ; some did not. One man, with a visage as coarse as his gait and manners, persisted in smoking on the after-deck. He was remonstrated with. His reply was, "I am an American citizen, and I will do just what I like." Heaven forbid that he should be taken as a sample of the American citizen ! A good democrat or a good republican he assuredly was not, for such a one would have respected the rights, not to say the feelings, of others.

When the steamer reached her wharf in New York, there was of course a great bustle in getting out and arranging the passengers' baggage. Men and women were crowded on the land side, but every third or fourth man was smoking with all his might, regardless of everybody but himself, blowing his unsavory fumes into the faces of men who did not smoke, and who hated the smoke if they did not hate the smoker, and into the faces of women—the matron pale from sea-sickness, or the fair, young girl, peering into the crowd on the wharf, for the form of father, or mother, or friend awaiting her return.

Public dinners and clubs are made places of tribulation more than entertainment for those who do not smoke. They who, in order to do honor to somebody or to some occasion, are drawn into a public dinner, are smoked as if they were so many pieces of bacon. No sooner has the last course of dessert been served, than the cigars are brought in, and the room is enveloped in a cloud of tobacco fume. Probably half the guests do not smoke at all. That does not matter. Those who do smoke have, of course, according to their own theory, the right to drive out, or, as one might put it, smoke out all the rest ; so that, with the ever-refilled glasses, the thick vapor blown out of mouths already surcharged with the vegetables and viands, the clatter of plates and the voices of the orators, the sad and submissive non-smoker has, to put it mildly, rather a hard time of it.

In the Forty-second Street Railway Station in New York is a notice bravely displayed in large black letters on a bright ground,

"Smoking strictly prohibited in this room." It goes on nevertheless. The keepers of the place see it, the policemen see it, but they do nothing. I pointed out a smoker to one of these policemen, and called his attention to the notice. He answered that it was not his business to interfere. Indeed, one might be inclined to suspect that the notice was a joke, after all, and that what seemed to be bad grammar was good grammar nevertheless, and signified the act of prohibition rather than the thing prohibited. The mania has as many manifestations as sorcery. Sometimes it is in the form of a cigarette, which a twelve-year-old boy asks a grown-up smoker to light for him in the street; sometimes in the form of a cigar-stump, still lighted, in the hand of the smoker as he gets into an omnibus or car, so enamored with the taste that he has no heart to let even the stump go; sometimes it is in the form of a man breaking the rules of the elevated railways, and lighting his cigar as he leaves the platform or descends the stairs; sometimes in the taste for drink which the smoking begets; sometimes in the opening of a window and puffing covertly out of it, as if nobody else could smell or see.

It does not lessen the wrong which those who do not smoke suffer from those who do that so many of the latter are unconscious of it. It is impossible otherwise to account for the number of amiable gentlemen who, without even asking leave, make no scruple of lighting cigars in places where there are ladies, or gentlemen who not only do not smoke, but who detest the practice. It may be that they think long tolerance has ripened into right, or, without thinking at all, but with an assurance alien to all else they think or do, they assume that what seems good to them must seem good to all. The smoker's creed appears to consist of three articles: First, smoking is good for me. Second, being good for me, it must be good for everybody else. Third, therefore, everybody else shall have it. Now, we non-smokers disbelieve the first, deny the second, and resist the third.

If this creed were a true one, the smoking-car of a railway would be a patch of paradise. Try it, then, with a party of ladies. Let a traveler, smoker or non-smoker, entering a train at a way-station with such a party, chance to light upon this car. He will hurry through it as if it were a place accursed, and the first word to hear from the ladies will be an exclamation of extreme disgust, and, as they step on tiptoe over the grimy floor, lifting their skirts and holding their breath to exclude, if possi-

ble, every particle of that cloud of tobacco, thick enough to cut with a knife, they will rejoice on reaching the other door, as those who have escaped from an evil den, so foul, filthy, and fetid is the whole concern.

*Why* smoking is disagreeable to his neighbor is not for the smoker to ask ; that is none of his business. That it is disagreeable, is enough for the neighbor, and it should be enough for him. He may, and no doubt does, like it. It is an old maxim that there is no disputing about tastes. There are people who like unsavory smells. One who has lived all his life by the side of a slaughter-house may take pleasure in the smell of offal ; and workmen in the fat-boiling establishments to the east of Murray Hill may like the odor ; but, if others do not like it, it is their right not to have it. Reasons for disliking it might be given in plenty if that were necessary. Every puff of tobacco blown out of a man's mouth is loaded with saliva. Now, no one likes to be spit upon. Take a white cambric handkerchief, and hold it so as to breathe into it a little tobacco-smoke. There will be left a sediment of yellow matter resembling ear-wax. This is what you take in when a smoker blows in your face a whiff of his tobacco.

When we pass beyond the domain of taste to consider what is useful or hurtful, each must be allowed to decide for himself. This much, however, we may be permitted to say : Whatever else, good or bad, smoking may do for the smoker, it can hardly be doubted that it calls into exercise the selfish elements of his nature. It takes possession of many men who are in general amiable, generous, and deferential to others, but who are reduced to such a condition of servitude to tobacco that they forget their habitual good manners in other respects, and take no thought of the discomfort they inflict. Some there are, the more scrupulous and the least enslaved, who, before lighting a cigar, will ask their neighbors whether they have any objection, or whether it is disagreeable to them. Why do they ask ? If they would reflect a little they would perceive that the mere fact of asking leave is a condemnation of the practice. When one holds a bunch of grapes in his hand, he does not ask his neighbor's leave to eat them. More likely he will ask the neighbor to partake and expect him to eat half of them. If one were to write down what he thinks passing in the minds of the two parties about tobacco, the imaginary dialogue would be in this wise : Q. " Will smok-



ing be disagreeable to you?" A. "Why do you ask?" Q. "Because I know it is disagreeable to many." A. "Is not that a reason for not asking me?" Q. "Why?" A. "Because I do not like smoking, and I do not like to disoblige you." This happens when they stand on an equal footing. When they do not thus stand, the wrong is the greater. Many persons, most persons indeed, dislike to refuse to another the privilege of indulging his taste or appetite; and when one is very desirous to obtain or keep the good-will of another, he is put under a special constraint. If a young man of agreeable conversation takes a seat on the veranda of an hotel or the deck of a steamer beside a young lady, and, pulling out his cigarette and match, asks her if his smoking will be disagreeable to her, she is unfairly treated; because, if she says no, she probably suppresses her real feelings, and suffers a temporary inconvenience, but enjoys his attentions and conversation; while, if she says yes, she loses both, and possibly his future good-will.

How can the smoker and the non-smoker reconcile their respective pretensions? Nothing is easier. Let the smoker smoke unto himself; but let one, who does not smoke or take tobacco into his mouth or blow it out of his nostrils, be free from the annoyance. The non-smokers have their remedy in their own hands. Let them resist every encroachment on their rights. Let them refuse to frequent places of amusement or take passage in conveyances where they are not protected against tobacco. If, for example, it were once understood that a particular line of steamers makes adequate provision for the defense of passengers against the intrusion of smokers, that alone would surely gain, other things being equal, many passengers who would refuse to go where their rights are habitually violated, as they now are, in many of the river and sea-going steamers. The community is made up of individuals. Let each assert his own rights, and the abuse will cease. In short, if those who do not smoke will let it be known, once for all, that they mean to have their rights respected, they will be respected.

## JUDICIAL ROBES.

At the convening of the Court of Appeals on Tuesday, the 14th of January, 1884, being the first day of its sitting in the new Capitol, Mr. Field presented the following resolutions of the State Bar Association :

*Resolved*, That the example of the Supreme Court of the United States and of other courts in our country in retaining the use of the black-silk robe when in session is in accordance with the historical traditions of our judicial institutions and agreeable to a cultured public taste.

*Resolved*, That their Honors, the Chief Judge and the Associate Judges of the Court of Appeals of this State, be and are memorialized on the subject, and respectfully recommended favorably to consider the adoption by them of similar robes when sitting *in banc*.

In presenting the resolutions he said : The New York State Bar Association at its annual meeting, on the 8th instant, appointed me its committee to present to you at the opening of your present session the resolutions of that body, recommending that the Judges of the Court of Appeals, while holding court, should wear robes of office. The appointment devolves an agreeable duty upon me because it enables me not only to serve my brethren but to express my own views and wishes. And in doing so, you will allow me, I am sure, to give some of our reasons. A badge of office has been worn by judges the world over. A custom so general must have a foundation in reason. It is possible, no doubt, for a rude sort of justice to be dispensed without ceremony or sign of office. We can imagine judges at one end of a table and lawyers at the other, all sitting and covered, debating the cases across the table, while a promiscuous crowd of suitors surges through the room, and it might happen for a while that the guilty would be punished, the innocent released, and the spoiler deprived of his spoil ; but we think the scene must end in general confusion and contempt. The simplest rule of ceremony requires judges, counsel, and audience to be uncovered,

the judges to sit apart on raised seats, and the counsel to stand while addressing the court or examining witnesses. To this has been lately added another, that the court and the bar exchange salutations as the judges take their places. Should there be anything more? The answer depends upon a consideration of what would be the most becoming in the dress, language, and demeanor of those who participate in the administration of justice.

We think that some insignia of office would befit the high judicial functions which you exercise, and that none can be found so appropriate as the robe, so unostentatious, and so conformable to the usage of our forefathers.

The robe has been worn by judges from time immemorial. In one of the oldest books of our race the hero is made to boast that his "judgment was as a robe and a diadem." The ermine is a synonym in our literature for spotless justice. In the Palace of Justice of France, and in the Westminster Hall of England, the judicial function has al-

ways been performed in the judicial robe. In our own country the judges of our fathers' time sat in robes. The judges of the Supreme Court of the United States have never entered the chamber where their august functions are performed without wearing their robes of office. Marshall, Story, and Nelson wore

them. The garment is no more a badge of monarchical than of republican office. Indeed, insignia of office more befit a republican than a monarchical country, for while in the latter they represent the majesty of the throne, in the former they represent the majesty of the people. These insignia tend to inspire respect and to gratify sentiment, and it is sentiment, after all, which sways the world. The flag is the expression of a feeling, an in-

stinct that is universal. "An army with banners" is described in our most sacred record. What but sentiment has adorned these walls, that our highest seat of justice might have fit surroundings? If ever a sordid motive has had part in the raising of this building, it was nevertheless the sentiment of the people which laid the foundation-stone and raised the topmost tower; a feeling that the people's house should be worthy of the people; that the place where their great officers discharge their trusts should be not only ample and convenient, but commanding in its decorations as in its proportions.

If our highest court of justice is ever to have any insignia of office, there can be, as I have said, none better than the robe; none simpler or more graceful and convenient. It is the easiest

to put on and the easiest to lay aside ; it requires no other change of dress ; it is simpler than the uniform which officers of the army and navy wear ; simpler than the costume which society exacts on many occasions. For these reasons we ask you to wear it, as befitting your great office and consonant with our republican ideas of simplicity and dignity. And when in the long years and generations that will pass, before this Capitol crumbles into dust, as often as the door of this chamber is opened to receive you and your successors, coming in the name of the law, may all men know that you come to render justice and judgment, without fear or favor, spurning dictation, deriding calumny, and conscious that rectitude of purpose is its own reward !

*"Tantum a vobis petimus, ut omnia rei publicæ subsidia, totum statum civitatis, omnem memoriam temporum præteritorum, salutem præsentium, spem reliquorum, in vestra potestate, in vestris sententiis, . . . positam esse defixam putatis."*

Chief-Judge Ruger, on behalf of the court, made reply as follows : " We are much gratified by the interest which the resolutions presented induces us to believe that the bar of the State feel in the ceremonial and dignity to be observed by this court in the performance of its judicial duties. Neither can we omit to express our gratification at the selection of one of the oldest and most honored members of the legal profession through whom the Bar Association have communicated their wishes to us. The resolution presented merits and will receive the respectful attention of the Court, and will be considered with a view of arriving at that result which will be most likely to promote a dignified and efficient administration of the law."

## CODIFICATION OF OUR COMMON LAW.

A SHORT REPLY TO A LONG ESSAY, FEBRUARY 18, 1884.

AN ANSWER TO MR. JAMES C. CARTER'S PAMPHLET ON THE PROPOSED  
CODIFICATION OF OUR COMMON LAW.

THIS pamphlet, which I heard of only a few days ago, appears to have been published under the auspices of the "Committee of the Association of the Bar of the City of New York," a highly respectable association of eight hundred lawyers out of seven thousand in the city—one in nine—duly certified by an "extract from the minutes," and ordered to be "circulated among the members of the Legislature, and of the bar of this city and State, and other persons interested in the subject." There is, however, nothing new in it. It is the same old committee, so far as appears, and it is the same old story, which the Legislature, the bar, and "others interested in the subject," have heard time and time again, for the last nine-and-thirty years. The voice is a little disguised, it may be, when heard from behind the curtain, but as the actor advances to the foot-lights, we behold the same visage glaring at us that has glared so often before. To change the figure a little abruptly, "The voice is Jacob's voice, but the hands are the hands of Esau."

The pamphlet is divisible into five parts, corresponding to the five acts of a play; beginning with a vilification of codification in theory, followed by a vilification of codes in practice; then a vilification of the Civil Code now proposed in particular; next, a vilification of the courts and the Legislature; and, lastly, a vilification of me. I propose to take each in turn.

### IN THE FIRST PLACE.

As to the theory of codification, I will confine myself to one or two reasons by way of *argument* and add some by way of *authority*. The proposition of our adversaries, stated in a con-

densed form, appears to be, that while codification of the statutes may be good, codification of the common law is bad. The proposition confutes itself, considering the nature of the statutes. One has but to look into our statute-book to see that statutes are enacted year after year to declare, change, or repeal rules of the common law. In other words, if we first turn parts of this law into statutes, we may then make a new statute of these statutes and call the new one a Code. *This is codification of the common law.* So that if, instead of beating the air with denunciation, our adversaries were to change the question from the one whether codification be desirable, to this other, whether the particular statute in question be desirable, they should logically cease to attack codification and confine their observations to the statute before us.

Or, if the proposition be, that though codification of *some parts* of the common law may be good, that of the rest would be bad, I ask which do you include among *the rest*? What is the part that can not be codified? Is it the law of crimes and punishments? That has been codified already. Is it the law of procedure, civil or criminal? That, too, has been codified. Is it the law of real property? That was mostly codified fifty years ago by the Revised Statutes in some 250 sections. The proposed Civil Code adds but a few sections to make a complete code of our law of real property. Is it then the law of partnership which can not be codified? That has been codified in India by provisions taken in part from our Civil Code. Is it the law of negotiable paper? That has been nearly codified in England within two years. Or, is it the law of commercial contracts in general? These contracts are precisely the subjects on which Judge Story and his colleagues most strongly insist, as will be seen in the extracts below. Tell us, then, what other subject is that on which the rules of the common law can not be written down with method and precision. Until you can tell us this, pray do not declare against codification.

The proposition, moreover, assumes that the present condition of the law is well enough. I affirm that it is not. I affirm that it is not only not well enough, but, in fact, is fast becoming unendurable. We have in this State seven judges of the Court of Appeals, forty-six of the Supreme Court, counting twelve who begin in June, and eighteen of the higher city courts—seventy-one—all making case law, judge-made law, or common law,

whichever you may choose to call it. In this endeavor, they have the assistance of eleven thousand lawyers, paired regularly one against another, at every trial, this side insisting that the law is, or should be, this way, and that side that way, the sides changing perhaps at the next trial. If here be not confusion worse confounded, or chaos, as the late Chief-Justice of England described the like there, then I know not what may answer that description. This, however, is a small part of the trouble. If the other States have the same proportionate number of judges, there are in the United States more than seven hundred, making laws, not for their own States only, but for all the States. More than this, the judges of England, Scotland, and Ireland are engaged in the same task of making laws for their own people and for us. I find this taunt in a late English paper. Is it wholly undeserved?

"The British King and the British Parliament still lay down, through the law which proceeded from one or the other of them, rules of life for Americans which they dare not disobey. The old idea that English law is the perfection of human reason has very much died out in the country which once believed in that audacious maxim, but it is still acted upon by Americans as if it were true, and the lives of three fourths of the nation are affected by it at every turn."

In the last volume of decisions by our Court of Appeals, 154 cases are reported as decided, including 32 reversals, 2,180 are mentioned as cited by counsel, and 550 as cited by the court. In *one* of these causes the counsel referred to 136 authorities, which they thought might guide the Court to a safe conclusion, some from this State and the rest from twenty-one other States.

*Thus much by way of argument. Now for authority.* Better than any words of mine in advocacy of a codification of the common law, I will give, not the fierce language of a disputant, not the chance words of a thoughtless talker, but first, the deliberate expression of the "State's collective will," then the carefully chosen sentences of the last of our Chancellors, and last the elaborate report of one of the greatest of Federal judges, joined with three lawyers, afterward judges of Massachusetts, and one eminent law professor.

[Here follow extracts from the Constitution, the Letter of Chancellor Walworth, and the Report of the Massachusetts Commissioners, Judges Story, Metcalfe, Forbes, and Cushing, and Professor Greenleaf, which it is not important to reprint here, except as to three sentences of the report.]

"These branches of commercial and maritime law are not only capable of being put into the form of a positive text, but of being condensed into a text of comparatively small extent. It is not too much to affirm that the *whole law of insurance*, as far as it has been ascertained and established by judicial decisions and otherwise, may now be stated in a text not exceeding thirty pages of the ordinary size of octavos. In point of fact, it is embraced in the Commercial Code of France in less than half that space; and most of the principles of that part of the Code are the same as those of our law."

Here I beg leave to observe that the whole law of insurance in our Civil Code occupies, with the notes, forty octavo pages. Thus much for my answer to one part of this pamphlet.

#### IN THE SECOND PLACE.

The animadversions of Mr. Carter upon all former codes are answered and disproved by a single test, which may be applied in the form of a question : Has any Code heretofore enacted ever been repealed in order to go back to a pre-existing common law ? If he can show us one such instance, he will show what I have not seen, and what I believe does not exist. If he can not show it, he stands condemned by the experience of mankind.

He seems to care nothing, however, for the experience, or, for the matter of that, the opinions of other men. He knows what is good for them better than they know themselves. He has made up his mind, and it is unfavorable to codes. He may, for aught I know, reject the Ten Commandments. He is harder to please than anybody else, for every other adversary of the theory of codification can find now and then a good Code. Even Chancellor Kent says in a note to his excellent Commentaries :

"The *Partidas* is the principal code of the Spanish laws, compiled in Spain under the reign of Alphonso the Wise, in the middle of the thirteenth century, and it is declared by the translators to excel every other body of law, in simplicity of style and clearness of expression. It is essentially an abridgment of the civil law, and it appears to be a code of legal principles, which is at once plain, simple, concise, just, and unostentatious to an eminent degree."

This is my answer to another part of the pamphlet.

#### IN THE THIRD PLACE.

Of the particular code now before the Legislature, being the Civil Code reported in 1865, and since revised and re-revised with



no little care, I have first to say that it has been before the people of the State for nineteen years, and has been subjected to the most malignant criticism, and that every objection made to it, good or bad, has been considered, and, as I think, obviated. At all events, if there be any objection now possible to be made to any provision or article, let it be made and obviated by the better wisdom of the Legislature. The objection once taken that it proposed some changes (suggestions of which, be it remembered, were required by the Constitution and the law under which the commission was organized), this objection I say has been yielded to, in order to disarm opposition ; and, as the Code now stands, it contains only a few inconsiderable changes from the existing law, and these such only as I think every one must admit to be desirable. But if there be still any objection let it be removed, as it can in a few hours, by slight changes in the text. The Code now speaks for itself. Let it be read, or, if there be not time for that, let some part of it be read—that relating to real property, for instance—to see if there be anything wrong or strange in its provisions. Or look into the title on insurance, or on negotiable instruments, and see if there be anything to be alarmed at, anything which would not be found useful in every counting-house in the State.

The truth is, that all the cry about there being something dangerous or revolutionary in the Code, is the offspring either of malignant opposition, of ignorance, or of prejudice. It would be blindness not to see, and disingenuous to deny, that American and English lawyers are, from the beginning of their studies, nurtured with such a diet of prejudice that the chances are against their believing anything new to be true or anything old to be false. If they would bring themselves to consider the subject with the care with which they construct their briefs, they would, I can not doubt, come to think it a part of their duty to help make the laws of the land more accessible to the people, to the judges, and to themselves ; and more easily understood when found. Why, indeed, should they not rise to the height of their profession, and, remembering the privilege they have received from the commonwealth, and using both their learning and their opportunity, make it a point of honor as of duty to turn their gifts to the advantage, not of their clients only, but of the whole people, studying how to make the law an open book and the administration of it as swift as is compatible with safety, as sure as human will and wisdom can make it, and so near

~~and inexpensive as to lie within reach of the humblest, the weakest, and the poorest of all the children of the State?~~ It is such high ambition that has made the greatest lawyers of past ages, Cicero and Scævola, Mansfield and Romilly, and others like them, and exalted their profession to be in its ideal the most noble of all that concern human affairs. But as a general rule we might as soon expect a Mohammedan to take a Christian to his bosom as a case-lawyer, or, I might say, a case-hardened lawyer, take a Code to his. These are not pleasant things for a lawyer who loves his profession and believes in its inherent greatness to say, but they are true nevertheless, and, being true, should be understood by the people. The average practicing lawyer is, and has always been, against law reform. His heart may be as pure as the snow newly-fallen upon the mountain, his philanthropy as clear as that of Howard or Cooper, yet whenever an amendment of the laws is proposed we may be certain to find him standing at the gates of reform with a battered shield on his breast and an old javelin in his hand. Every law reform has, it is true, been brought about by lawyers, because none but lawyers knew how to bring it about; but this, be it understood, has been done by the small band of reformers against the hosts of obstructives.

These men clamored against the Revised Statutes until their voices were drowned in the volume of praise; they made themselves hoarse over the Code of Civil Procedure of 1848, and before they were cured it had made the circuit of the globe; they laughed over the Code of Criminal Procedure as dead, until it leaped into life before their astounded vision; and they passed solemn resolutions against the Penal Code, from which, after not many days, they had the mortification to retreat. No measure of law reform has been proposed within my memory which they did not at first laugh over, then clamor at, then resolve against, and at last, in their despair, predict direful evils from, until the derision, the clamor, the resolve, and the prediction were turned to mourning in sackcloth and ashes.

Mr. Carter has much to say about the rules of general average. Why not have the candor to add that, when the Code was first proposed, it professed to take the law as it then existed, with slight modifications; but that in the legislative session of 1883, with the sanction of the Judiciary Committee, the York and Antwerp rules, proposed by the Association for the Reform and Codi-

fiction of the Law of Nations, were introduced instead? He, perhaps, does not know that, in order to avoid discussion over a subject of minor importance in the daily business of life, the subject has been now omitted. Neither, perhaps, does he know that, in the report of the Council of the Association made at Cologne in 1881, it was stated that these York and Antwerp rules "have become all but universally adopted"; nor that in the year before it was reported to the Association that "the first judgment of the English Queen's Bench and Appeal courts, upon a matter of general average, has not only ratified, so far as the subject under consideration is concerned, the principles upon which the York and Antwerp rules are based, but has actually pronounced, that the custom or practice which, for at least eighty years, had prevailed among English average adjusters, and according to which they adopted a contrary system of adjustment, was at variance with the common law of England."

He sneers at the changes which have been made at successive revisions. Yes, indeed, we have tried to make the Code better every time, and, however small is the aid we have received from him and his colleagues, we have remembered the words of Macaulay, that "the best codes extant, if malignantly criticised, will be found to furnish matter for censure in every page," and that they, the Indian commissioners, had done as much as could reasonably be expected from them, if they had furnished that which might, "by suggestions from experienced and judicious persons" (like Mr. Carter, for example), "be improved into a good code."

At the same time we have not forgotten these words of Gibbon: "That the discretion of the judge is the first engine of tyranny; and that the laws of a free people should foresee and determine every question that may possibly arise in the exercise of power and the transactions of industry."

Mr. Carter refers, with great satisfaction, to the hasty criticisms of Mr. Amos, which seem, after all, to rest on a few definitions. How strange, indeed, his words appear beside a single sentence of those jurists of California, who, under the double responsibility of examining for themselves and for the State, reported that *they* "found the four codes, the Political Code, the Penal Code, the Civil Code, and the Code of Civil Procedure, as prepared by the commissioners, and enacted by the Legislature, perfect in their analysis, admirable in their order and arrangement, and furnishing a complete body of laws, the first time (they

believed) that such a result had been achieved by any portion of the Anglo-Saxon or British races”!

I may be pardoned for adding that, since Mr. Amos's work was published, I have had the good fortune to make his acquaintance, and have seen much of him, and, though I can not say that he has told me so, I am led to think that he has changed his opinion. The works of Mr. Amos and Mr. Pollock, however, both show that this Code has had no inconsiderable influence upon English opinion, and upon legislation both in England and in India. An English writer is rather slow to find good out of England, and even Pollock could say nothing better of the French codes than their showing that an imperfect code was far better than no code at all.

But, however this may be, the *speculations* of any number of theorists amount to nothing in comparison with *experience*. Our Civil Code has been copied in California and Dakota, the most western and the most central of the political communities on this continent, and it has been their law for a decade. How they find it, let the letters in the Appendix show. They were written by Mr. Dwinelle, Mr. Haymond, and Mr. Burch, who, having been concerned in the introduction of the Codes to California, may be presumed to be most observant of their operation; by Mr. Stewart, late Senator in Congress from Nevada; by Mr. Whitney, now a Senator of California; by Mr. Cadwalader, an eminent lawyer; by Mr. Sanderson, formerly Chief-Justice of the State; and by Judge Sawyer, United States Circuit Judge. The practice of ten years outweighs in importance the theories of ten professors. The Americans are a practical people, and they want something they can understand and live by.

#### IN THE FOURTH PLACE.

The vilification of the Legislature is set forth in several remarkable passages of the pamphlet I am answering—passages which I will not copy, but which it is amazing that one who desires the favorable opinion of the members should throw in their faces.

#### AND LASTLY.

Why Mr. Carter should vilify me I do not know, except it be from habit. I have done nothing that I was not commissioned by the State to do, as any one may see who will look at chapter

266 of the laws of 1857, and read it by the light of the Constitution ; and I have done the best I could. It is hardly a misdemeanor to take a commission from the lawgivers of the land ; nor yet felony to lay before them the fruits of obedience. But no matter. His censure does not in the least disturb me, and in the language of the lawyers, I submit it, without argument, to the judges of good taste and good manners.

## ADDRESS TO THE LAW SCHOOL OF THE UNIVERSITY OF NEW YORK, APRIL 7, 1884.

### THE DUTY OF THE LAWYER TO THE LAW.

**MR. PRESIDENT AND YOUNG GENTLEMEN :** It has been usual on occasions of addresses to law-students to give them advice about their studies in the school, and their duties to their clients and the courts, when they shall have entered the profession. I venture on the present occasion to depart from this custom, and to address you on a further duty, not less important or imperative, the duty of the lawyer to the law itself.

There are rules for human conduct which human law does not prescribe. The Author of our being and the Maker of all things has prescribed them. There are also rules of conduct which we call laws of society, rules of good manners and of good neighborhood. Of none of these, however, am I now speaking. I speak of that which we call "the law of the land"; in other words, the rule of property and of conduct prescribed by the sovereign commonwealth.

To this law what is the duty of the lawyer? It is his duty, first to learn it, next to apply it, and always to make it subserve the purpose for which it was designed—that is, to keep the peace, do justice, and thus promote human happiness. If it fails to accomplish these ends, if it works badly in any respect, it is his duty, more than that of other men, to help make it better. Why, it may be asked, is the lawyer, more than another citizen, bound to improve the law? Because he knows it more completely, sees with greater clearness the points of friction, and has the means of correcting and improving it more at his command than the unprofessional citizen. He is, in fact, a minister of the law set apart of his own seeking for that very purpose, and his duty follows his relation.

Such being the relation and the duty, what follows? It follows that whatever may be his success, whatever the stress of his business, he should never forget that he is placed where he is,

not alone to guide his clients aright, not alone to gain lawsuits, not alone to win fame or fortune, but to make the law itself better for his having lived as one of its servants, and so much the better the longer he lives. In short, the true function of the lawyer is not only to defend his clients in their rights according to the law, but furthermore, whenever he sees that the law itself is at fault, then to repair the fault so far as in him lies.

Do not misunderstand me. I do not mean that the lawyer, in his practice before the courts, should be wiser than the law. It is his great function to defend his client's rights according to the law. "Sittest thou," said St. Paul to the high-priest, "to judge me after the law, and commandest me to be smitten contrary to the law?" The relation of the lawyer to his clients and to the courts, though not more sacred, is different from his relation to the law itself. He may reason, and as I think is bound to reason, thus: This is the law, and so long as it is the law my client shall have the benefit of it. But he may also say, and should act as if he said: This law is unjust or unwise, and I will have it changed for the future if I can.

Having thus stated in general terms what I conceive to be the duty of the lawyer to the law, let me follow up the observation by showing the urgent need of the present performance of that duty. In doing so I must distinguish between the two divisions of the law, the substantive and the remedial.

Taking the latter first, and confining our view to the courts of this city and the Appellate Court, we see here the Supreme Court, with seven judges, including the two to come in June; the Superior Court with six judges, the Common Pleas with six also, the Sessions with three, one surrogate, six judges of the City Court, ten district justices, and ten police justices. This is the judicial staff of the city. What is the result? Bear in mind that it was proclaimed in Magna Charta, six hundred years ago, that "neither justice nor right should be sold to any person, nor denied, nor deferred." Bear in mind, also, that in this metropolitan city is concentrated the foreign commerce of the continent; that the daily transactions are enormous and rapid, that the stress of business will not admit delays, and that confidence between man and man depends largely on the efficiency of the law, for, though its active intervention be not sought in one transaction out of a thousand or a hundred thousand, the knowledge that it can be sought in case of need renders a resort to it in these

instances unnecessary. Take, then, for example, two litigations, one about the property of the living and the other about the property of the dead, and begin in the Supreme Court, as the highest court of original jurisdiction, and the one having the largest business, though it is but fair to say that in some respects it is not the most speedy. I can not, however, think the difference so great as to make it important to give the statistics of other courts.

We will, then, suppose a suit begun to-day respecting a disputed title to stock in a corporation. How soon will the suit be decided by the courts, including the last judgment in the Court of Appeals? From five to ten years. Follow step after step of the processes. The issue upon the written pleadings may be joined in twenty to forty days. Then what attendances from term to term, what vexatious delays, what sickness of hope deferred, before the trial is reached! And, when once begun, how it is dragged along, what long arguments on points of evidence, what badgering of witnesses, what insults to parties, what irrelevant testimony, what reams of short-hand notes long drawn out, till finally the case is given to the court! When will it decide? Who can tell? It may be in a month or three or six months. The decision is at last pronounced. Then comes an appeal to the General Term. It takes a month or several months to prepare for the appeal, the argument is had in three or six more, and the decision follows in another month or by the end of the next quarter or the next half year. Finally, the General Term decides, and in one instance out of every three reverses the trial judge, and sends the case back for a new trial. Suppose, however, the first judgment affirmed, the case goes then to the Court of Appeals, and such is the accumulation of arrears in that court, that it can hardly be reached in less than eighteen months, though when it is reached the judgment is speedy. We have now passed years since the beginning of the suit, and fortunate is the suitor if the litigation may be considered at an end. In one case out of every five the Court of Appeals reverses the lower court, and the cause goes back to begin about where it began before. Such is the wearisome process, when it is regular, without interlude. But how about the interludes, the affidavit interludes as we may call them, in matters of arrest, injunction, and receivers? What abuses do they not give rise to? I will not enlarge upon them, and I dismiss them from consideration with the single observation that



government by injunction, as it has been called and is now practiced in this city, is in my judgment a gross and monstrous usurpation. Suppose now this litigation ended and the property of the living disposed of for the time, at last one of the parties dies, and a new litigation springs up about the property of the dead. If the probate of his will in the Surrogate's Court is disputed, the trial may not be reached in half a year, and it may last for six months or a year longer. It has been the practice to set down several trials for the same day, one at one hour, and another at another, both dragging their slow length along.

This is what I have to say about judicial administration in this city. I have not said half what I might say if the time permitted and the occasion required it. But have I not said enough to show what a duty is laid upon us lawyers, upon you young gentlemen, and upon all who are expecting soon to enter the profession of which we are so fond and so proud?

My purpose has been to state the present condition of litigation in the city, not to explain the causes of it, nor to impute blame to any.

Having made these observations concerning judicial administration, let us turn to what I may perhaps designate, by way of contrast, the *popular* administration of the law. I refer now to the substantive law, the counterpart of that which we call remedial. This is the law which more than the other guides the citizen in his daily transactions. He can not buy or sell land or chattel, he can not rest or travel, he can not marry or give in marriage, he can not bequeath or inherit without the presence of that power which though unseen is ever present, though silent is ever heard. It is this power, this law, at once preceptor and guide, which for his own ease and safety the State most needs to teach the citizen and which he most needs to know. It is therefore the duty of the lawyer with all his heart to help render this substantive law so accessible and so intelligible withal as to lessen the occasions for resorting to the courts. We have already done it in respect of crimes and punishments. The Penal Code, which went into effect two years ago, gives to the citizen, the lawyer, and the judge, in a narrow compass, a little pocket-volume indeed, the whole of our substantive penal law, saving a few special subjects. This little work, bitterly opposed at first, has proved to be so convenient, and labor-saving in practice, that nobody would repeal it. What has thus been done for the penal

law I would have done for the civil also, and the rather because this law is for the most part administered by the people themselves.

When they know the rules prescribed for their government they conform to them and keep away from the courts. Few persons go to law for the love of it. A better knowledge of the rights and the duties for which the law provides would have saved many a lawsuit, impoverishing to the parties and wearisome to the courts.

Let us consider, then, what can be done for our substantive civil law, to put it in a shape more accessible and a form more intelligible to the people. To this end, let us walk into our State Law Library. Here are our laws : how many volumes are there ?—35,250. Are they the Statutes of the State of New York ?—125 volumes are, the rest are not. What, then, are the other 35,125 ?—7,000 of them are filled with the decisions of the courts. And are these decisions laws in New York ? Certainly. Do you mean that the decision of a court in Illinois, for example, is read in the courts of New York as a rule for decision there ? Certainly I do. They call it by different names. Sometimes they say it is not exactly authoritative, but it is evidence of the common law. But suppose there is a decision in Ohio just the other way ? That is cited also, and the New York court examines both, to see if it can then extract a rule for the decision of a controversy between two citizens of New York, on a question of New York law. We do the same with the decisions in other States than Illinois and Ohio. Open the pages of any of the New York Reports, and you will find citations of cases decided in the different courts of this country and of England, Ireland, and Scotland, to say nothing of the English colonies all over the world. The judges turn to these, weigh them, and at last give it as their opinion that the weight of authority is this way or that. And so a case goes to the General Term, where perhaps the judges give it as their opinion that the weight of authority is the other way ; and finally in the Court of Appeals it may be found that the point upon which the judges below differed was not involved in the case, or that both the lower courts were partly right and partly wrong. And so it has come to pass that our reports are prefaced with long tables, first of cases decided, then of cases cited, then of cases criticised, approved, disapproved, affirmed or reserved. This may be—I do not say it is—sport for the lawyer, but it is anything but sport for the client. Is there no remedy ?

Are we to go on forever in a hopeless search for something certain and something stable? Can we never give an opinion to a client, with any certainty that will prevail in the courts? Can we never expect the decisions of to-day to last for a lustrum?

The last volume of Supreme Court Reports (*30th Hun*) contains 169 cases reported in full or in part, of which 75 are reversals, while there is also a list of 464 other cases not reported, of which 127 are reversals. This volume shows the work of five months, May, June, August, September, and October, 1883. The last volume of the Court of Appeals Reports contains 154 cases, of which 32 are reversals, and the volume extends through the months of June, October, and November, 1883.

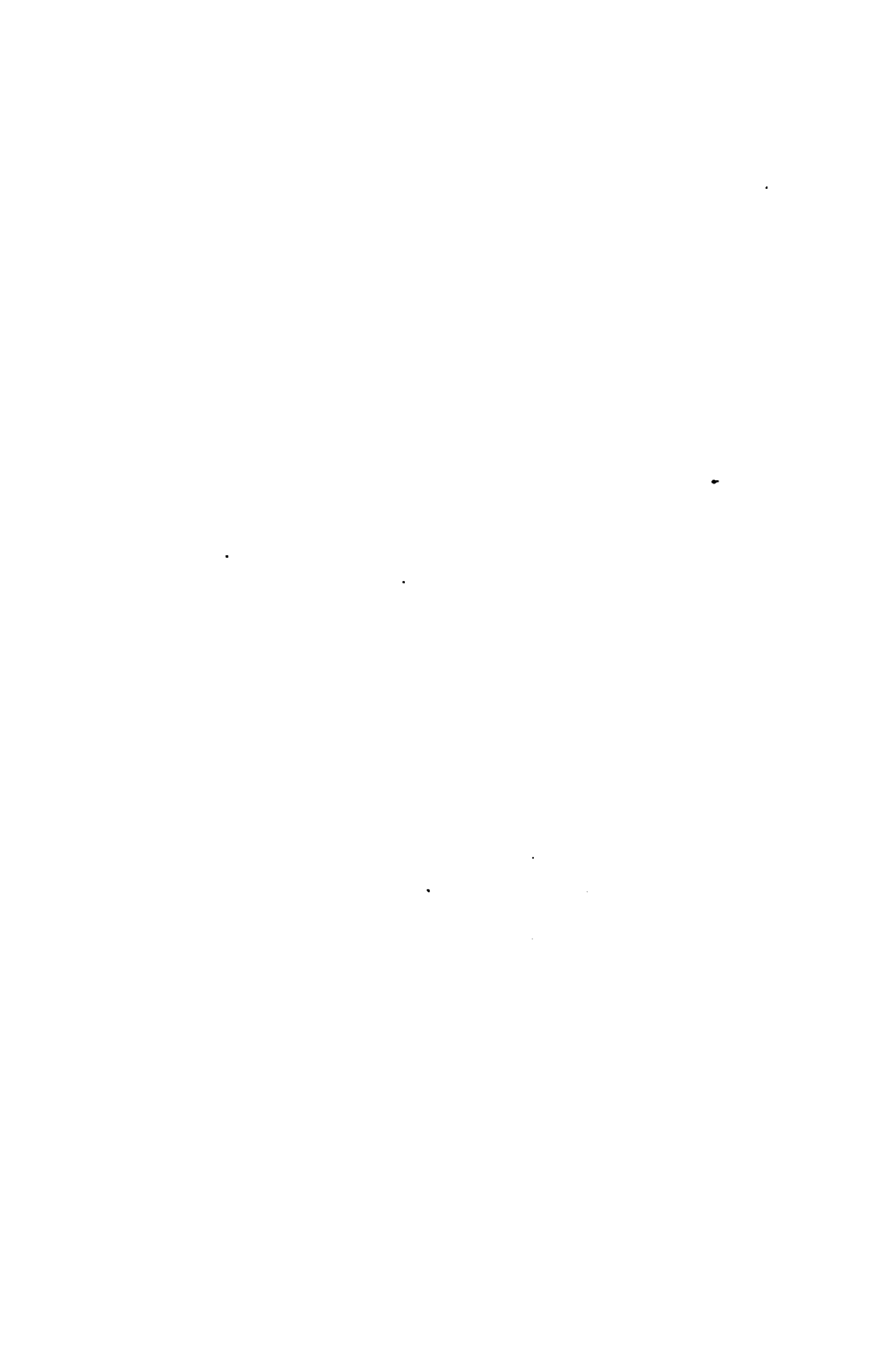
For these evils there is a remedy. It would be a reproach to our civilization to admit that there is not. Order can be brought out of this confusion. It is only our own profession that has hitherto prevented it.

Three hundred years ago, Bacon, Chancellor of England, greatest of all her chancellors through the ages, lawyer, philosopher, and teacher, at a time when the reports numbered only sixty volumes, proposed to James I that a digest of the laws of England should be compiled and that "those books" (the sixty volumes) "should be purged and revised, whereby they may be reduced to fewer volumes and clearer resolutions." It is one of the marvels of history that a single order of men should "so get the start of the majestic world" as to be able for a half-score of generations to fight off this purging, revising, and reducing process of Lord Bacon. Clearer resolutions indeed! What would he have said if he had foreseen the resolutions of these days? The accumulations are like the floods of the Western rivers preceding the vernal equinox, first a swelling of the current, then a rise higher and higher, then a torrent, and at last a rushing of great waters, sweeping and overwhelming as they sweep on.

Eleven years ago the Congressional Law Library held 26,000 volumes; it now holds more than 60,000. In the State of New York there are published on an average yearly four volumes of the decisions of the Court of Appeals, three of the Supreme Court, one of the New York Superior Court, and one of the New York Common Pleas, one of Surrogates' cases, two of Abbott's new cases, two of Howard's Practice cases, two of Civil Procedure cases, two of the Weekly Digest, one of New York criminal cases and one of the new City Court cases—twenty in all. The

number of decisions reported in each volume varies, of course, but they will certainly amount one with another to not less than one hundred and fifty in a volume, so that we have in this State alone 3,000 reported decisions every year. Taking the whole country, there are, it is estimated, one hundred volumes of reports yearly, and if each volume contains as many cases as the last volume of Massachusetts Reports, one hundred and sixty, there are published in each year 16,000 decisions. Every one of them is reported, that it may be cited and serve as a guide for the future. What a frightful admixture there must be here of blind guides, and what an illustration of the parable of the blind leading the blind, and the fate that befell them! Are we not approaching, if we have not already reached, the condition of Roman law in Justinian's time, as described by Gibbon, when "the infinite variety of laws and legal opinions had filled many thousand volumes which no fortune could purchase and no capacity could digest"? And if this inability to buy and digest be true of lawyers, much more is it true of those who are not lawyers, citizens who have other pursuits, and could not find time to read, if they could purchase, the books which contain that "wilderness of single instances," of which "the lawless science of our law" consists.

What, then, is the remedy? It is to reduce the bulk, clear out the refuse, condense and arrange the residuum, so that the people, and the lawyer and judge as well, may know what they have to practice and obey. This is codification; nothing more and nothing less. At this moment our substantive civil law is a conglomerate of most diverse material, gathered from many lands and many ages—Roman, Saxon, Norman, feudal, monarchical, and republican. Let us have instead, and in a single volume, not half so large as one of our books of reports, a code of the general rules of our American, our New York law, from whatever sources derived. To engage in the accomplishment of this noble task is the duty of the lawyers of this State, their too long neglected but their bounden duty. Our Anglo-Saxon race began its great career with a code, the gift of a sovereign king to a rude and subject people. What would he have thought if a seer of his time had foretold him that at the end of a thousand years, in a new world beyond the sea, then invisible to the eyes of Europe, the Code of Alfred would be expanded, with the enrichments of the intervening ages, into the code of the foremost of American commonwealths, the work and the guide of a free and sovereign people!



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